Supreme Court, U. S.
FILED
JUN 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

NO. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

MORRIS K. SIROTE
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

Counsel for Petitioner

Of Counsel:

SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

TABLE OF CONTENTS

Page

Petition for Writ of Certiorari 1
Opinion Below 2
Jurisdiction 3
Questions Presented 3
The Statutes Involved 4
Statement of the Case 4
Basis for Federal Jurisdiction in the Trial Court 9
Reasons for Granting the Writ 9
Argument 13
I. The Fact of Damage was Proved 13
II. Amount of Damage 17
Conclusion 22
Proof of Service 24

TABLE OF CASES

Page

Bruce's Juices v. American Can Co., 87 F. Supp. 985, 990 (S.D. Fla. 1949), aff'd, 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.), cert. dismissed, 342 U.S. 875 (1951) 10, 17, 18

American Motors Corp. v. F.T.C., 384 F.2d 247 (6th Cir. 1967), cert. denied, 390 U.S. 1012 (1968) 11

Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) 11, 14

Bruce's Juices v. American Can Co., 330 U.S. 743, 757 (1947) 10, 17, 19, 22

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 19

Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation, 607 F.2d 1133 (5th Cir. 1979) 1, 2

E. Edelmann & Co. v. F.T.C., 239 F.2d 152 (7th Cir. 1956) 11, 15

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 996 (8th Cir.), cert. denied, 326 U.S. 773 (1945) 10, 21

F.T.C. v. Morton Salt Co., 334 U.S. 37, 49, 50 (1948) 11, 14, 15, 16, 22

Foremost Dairies, Inc. v. F.T.C., 348 F.2d 674 (5th Cir. 1965) 10, 11, 15, 16

Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), cert. denied, 396 U.S. 1012 (1970) 10, 21

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 270 (5th Cir. 1979) 20

TABLE OF CASES – (Continued)

Page

Grace v. E. J. Kozin Co.,
538 F.2d 170 (7th Cir. 1976) 10, 21

Hanson v. Pittsburg Plate Glass Industries, Inc., 482 F.2d 220, 227 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974) 10, 11, 16

Kestenbaum v. Falstaff Brewing Corp.,
514 F.2d 690, 694 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976) 20

Perkins v. Standard Oil Company,
395 U.S. 642 (1969) 10, 11, 13, 14

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 143 (1968) 11, 14

Terrell v. Household Goods Carriers' Bureau,
494 F.2d 16, 20 (5th Cir.), cert. dismissed, 419 U.S. 987 (1974) 20

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-124 (1969) 10, 11, 14

FEDERAL STATUTES INVOLVED

28 U.S.C. § 1254(1) 3
15 U.S.C. § 13 ..... 4, 9
15 U.S.C. § 15 ..... 4, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

NO. .....

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the final order of the United States Court of Appeals, Fifth Circuit, 607 F.2d 1133 (5th Cir. 1979), entered on December 7, 1979, which reversed the judgment of the district court for the Northern District of Alabama awarding to J. Truett Payne Company, Inc. the sum of Three Hundred Seventy-Three Thousand Seven Hundred Forty-Two and 44/100 Dollars ($373,742.44) for a violation of the Robinson-Patman Act in the following entitled case:

CHRYSLER CREDIT CORPORATION, a corporation,	)	Plaintiff
v.	)	
J. TRUETT PAYNE COMPANY, INC.,	)	Defendant, Third Party Plaintiff - Appellee
v.	)	
CHRYSLER MOTORS CORPORATION	)	Third Party Defendant, Additional Party Defendant, Appellant

NO. 77-2331

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division

In addition, Petitioner respectfully prays a Writ of *Certiorari* issue to review that final order of the United States Court of Appeals, Fifth Circuit, on to-wit, March 18, 1980, which overruled and denied Petitioner's Petition for Rehearing, or in the Alternative Rehearing *En Banc*.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is reported in *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 607 F.2d 1133 (5th Cir. 1979). That opinion sought to be reviewed is also contained in the Appendix, pg. 1. The order overruling and denying a Petition for Rehearing, or in the Alternative Rehearing *En Banc*, was entered

on March 18, 1980, and is set forth at Appendix, pg. 7. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case was entered on December 7, 1979. Petitioner's Application for Rehearing, or in the Alternative Rehearing *En Banc* was denied on to-wit, March 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within ninety days of the Fifth Circuit's order denying a rehearing.

QUESTIONS PRESENTED

1. Does the court's requirement that the disfavored automobile dealer must affirmatively show actual lost sales to favored competitors as the *only* means of proving damage, rather than permitting the jury's appropriate inference of damage to stand, impose an inflated standard of proof under the Robinson-Patman Act thereby effectively preventing enforcement of the Act by private attorneys general?

2. In a market where keen competition exists between competing retail automobile dealers, does an automobile manufacturer's substantial price discrimination, totaling $81,248.94, against one of its dealers during a three and one-half year period, permit an inference of actual damage to the disfavored dealer so that a jury's verdict finding such damage should be sustained?

3. Does the same standard of proof regarding damage in a "public injury" Robinson-Patman Act case apply in this "private" Robinson-Patman Act case?

4. When there is both an inference of damage and direct proof of damage to the disfavored retail automobile dealer

as a result of the automobile manufacturer's price discriminations, is it permissible for the jury to award damages to the disfavored dealer at least in the amount "indicated" by the sum of the price discrimination?

THE STATUTES INVOLVED

The pertinent provisions of the Robinson-Patman Act, 15 U.S.C. § 13, a copy of which in full is set forth at Appendix, pg. 28, is set forth below:

> It shall be unlawful for any person engaged in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure or destroy or prevent competition with any person who either grants knowingly or receives the benefit of such discrimination or the customers of either of them. . . .

In addition, 15 U.S.C. § 15 states as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the main controversy and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

STATEMENT OF THE CASE

This price discrimination case was tried in the United States District Court for the Northern District of Alabama,

Southern Division, before the Honorable Judge Seybourn Lynne sitting with a jury. The jury returned a verdict of $111,247.48 against Chrysler Motors Corporation, which was trebled and an attorney's fee added. Judgment against Chrysler Motors Corporation was entered in the amount of $373,742.44. Chrysler's Motion for judgment notwithstanding the verdict or for a new trial was denied by Judge Lynne.

The evidence in that trial showed as follows:

J. Truett Payne Company (hereinafter "Payne") had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (Tr. 40). During a three and one-half year period from January 1971 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers in a market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers[1] competing with Payne (Tr. 46, 124). Chrysler Motors Corporation (hereinafter "Chrysler") had been paying rebates to Payne and the other competing dealers on various cars they purchased from Chrysler since the early 1960s. These rebates were paid under the terms of rebate or incentive programs which Chrysler formulated during that period. For the last five years of its operation, Payne lost money each year. During the time frame with which this law suit is concerned, Chrysler created approximately sixteen rebate or incentive programs, each lasting several months, under which it made payments to the four competing Chrysler-Plymouth dealers in the Birmingham-Jefferson County, Alabama market area. Chrysler

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth, Central Motors, and Bessemer Chrysler-Plymouth (which was later changed in 1972 to Vestavia Chrysler-Plymouth).

unilaterally assigned each dealer a separate and different quota for wholesale purchases and/or retail sales which each had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car under all of the rebate programs reduced the price of that new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (Tr. 56, 62).

In almost every program, Chrysler signed Payne a higher quota than its competing dealers and Payne had to meet that higher quota in order to receive the rebate payment. In other words, Payne had to either sell more new cars or purchase more new cars from Chrysler in order to obtain a rebate payment from Chrysler on those new cars. Compared to the other dealers, Payne actually paid much more for each car in almost every rebate program and had a total discrimination of $81,248.94. As a result of the high quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers (Tr. 69).

The rebates paid on a particular car by Chrysler reduced Chrysler's price charged the dealer on that car. (Tr. 256, 617-618). Payne's lost sales reduced its cash flow so that Chrysler Credit Corporation withdrew its floor plan credit line to Payne, forcing Payne to close down (Tr. 68-69). These rebate programs were one of the causes that put Payne out of business (Tr. 100). Because of the rebate programs, Payne ended up forcing business in order to make a sale and was losing some customers and sales (Tr. 65-67; 91-92; 94-95; 126-127). In order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer (Tr. 55, 711-712). Payne had to sell at a smaller profit than it could afford to sell in order to compete effectively, and generally it did not meet the lower

prices of the other dealers. (Tr. 91; 124). The rebate programs and the payments made by Chrysler to the various dealers affected the price at which the cars were offered to the public because the rebate effectively lowered the cost to the dealer per unit per car (Tr. 125).

Dr. George Ignatin, an economist at the University of Alabama, testified that the rebates paid by Chrysler per car under those rebate programs reduced each dealer's cost of that car which had been purchased from Chrysler (Tr. 265). Dr. Ignatin is thoroughly familiar with the car market in Birmingham and did several studies about the Birmingham market (Tr. 201; 695). Chrysler's rebate programs reduced competition in Birmingham market between Chrysler dealers and had an adverse effect on competition (Tr. 222). As a result of the rebate payments to the competing dealers, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (Tr. 203). It is well known in the industry that all dealers discount off list price in setting the retail price of a car to consumers. Because of these rebate payments, Payne could not discount its cars from list price as much as it could if it had received the same rebate per car as the other dealers competing with Payne at that time; and the other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne received an equal rebate per car from Chrysler. The ultimate effect of the Chrysler rebate programs was to increase the retail price to a consumer (Tr. 202-204; 205).

The price discrimination caused by the rebate programs was one of the causes of Payne's going out of business (Tr. 100; 706).[2] Without those price discriminations, Payne

[2]In its opinion on December 7, 1979, the Fifth Circuit stated that Dr. Ignatin prefaced his testimony on the issue of the rebate programs causing Payne to go out of business by stating that "I really can't tell you without having you know – it's a hypothetical question." Actually, this statement

could probably have made a profit and stayed in business. Dr. Ignatin reviewed and analyzed each of the rebate programs and showed for each program how much more money each competing dealer received on a per car basis than did Payne under that same program. The payments for each program were made by Chrysler only on the type or model car described in program rules. In almost every instance, different amounts were paid to each dealer on each particular model for which a dealer qualified during a period of the program's duration. Dr. Ignatin's analysis of those programs compared the monies received by Payne with the monies received by the other favored dealers, and showed the actual monetary difference that each dealer received on a per car basis during each program[3] during that three and

---

was not made by Dr. Ignatin with respect to the issue of whether or not the rebate programs caused Payne to go out of business. Dr. Ignatin made that statement with respect to whether or not, in his opinion, a company like Chrysler could devise an incentive program that paid a dealer monies based on that dealer's strength and potential compared to other dealers. See Tr. 705-706. That statement by Dr. Ignatin had nothing whatsoever to do with his opinion that the rebate programs, as applied to Payne, were, in fact, discriminatory and caused Payne to go out of business.

[3]In order to not be tedious, each individual program will not be analyzed in this statement of facts. However, in order to show the Court an example of the type of rebate program involved, we will analyze the first program known as "Winter Winners" which ran for a period of two and one-half months during 1971. Chrysler assigned Payne a wholesale purchase quota of ninety-nine (99) new cars which must have been purchased from Chrysler by Payne in order to receive rebate payments on new cars that Payne sold to customers. The rebate payments would be made by Chrysler to Payne and the other dealers on the retail sales made by each dealer, thereby reducing the cost to each dealer of that particular car sold. Chrysler assigned Central Motors a wholesale purchase quota of sixty-three (63) units, Roebuck Chrysler-Plymouth only fifty-four (54) units, and Bessemer only thirty-nine (39) units. In that program Payne did not qualify for any rebate payments because it could not meet its wholesale purchase quota. All the other competing dealers did qualify and received rebates on every car they sold at retail, in amounts ranging from $30 to $60 per model. During that period when the program was in effect, Payne would have received a total of Five Thousand Two Hundred Eighty Dollars ($5,280.00) in price reductions on the various new cars that it sold if it

one-half year period. The total amount of price discrimination against Payne during this period was $81,248.94 (Tr. 191). Of the sixteen programs analyzed, only three were non-discriminatory to Payne. Two of these programs did not have different purchase or sales quotas established for the various dealers, but had identical quotas. Only in one rebate program where different quotas were established for each dealer was Payne not disfavored. Payne did not claim any damages resulting to it from those three programs. (See the "Stock Eliminator" program "Chrysler-Plymouth Early Clean Up Bonus," and "C-Body Bonus" at Tr. 158, 178, 184, 186).

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

This case was brought in the trial court under the Robinson-Patman Act, 15 U.S.C. § 13 and under § 4 of the Clayton Act, 15 U.S.C. § 15, which permit a suit in the United States District Court by any person who shall be injured in his business or property as a result of anything forbidden in the anti-trust laws, specifically the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT

The decision below severely undermines private plaintiffs' rights to enforce the Robinson-Patman Act since that

---

had received the same rebate per car sold that the other dealers did in fact receive from Chrysler at that time. This Five Thousand Two Hundred Eighty Dollar ($5,280.00) figure was the total price discrimination during that program.

Charts showing the rebate payments to each dealer under all rebate programs, the resulting reduction in unit cost from Chrysler to each dealer and the total price discrimination to Payne for each program are attached to the Appendix, pp. 10-27. These charts represent Dr. Ignatin's analysis of the Chrysler rebates and their effect of price discrimination on Payne. Each chart was introduced as an exhibit in the trial. The abbreviations on each chart are explained in the introduction to the Appendix.

decision imposes an unwarranted standard of damage proof requiring proof of actual lost sales and profits as the *only* means of proving damage to the plaintiff's business. The Fifth Circuit's opinion conflicts with the following decisions of the United States Supreme Court and other circuit courts of appeal which have held that a jury is entitled to infer injury to the plaintiff when the plaintiff has been disfavored by substantial price discriminations in a market of keen competition: *Perkins v. Standard Oil Company,* 395 U.S. 642 (1969); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 124 (1969); *F.T.C. v. Morton Salt Co.,* 334 U.S. 37 (1948); *Hanson v. Pittsburg Plate Glass Industries, Inc.,* 482 F.2d 220 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136; *Bruce's Juices v. American Can Co.,* 87 F. Supp. 985 (S.D. Fla. 1949), aff'd, 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.), *cert. dismissed,* 342 U.S. 875 (1951); *Foremost Dairies, Inc. v. F.T.C.,* 348 F.2d 674 (5th Cir. 1965).

The decision below should be reviewed because it erroneously interprets and fails to apply to the facts in this case the governing principles of the Robinson-Patman Act. In addition to those cases cited above, the decision below was contrary to a decision of this Court and three decisions of other United States Courts of Appeal which have held that, once illegal price discrimination is proved, the plaintiff is entitled to recover damages equal, at least, to the amount that the plaintiff was charged illegal discriminatory higher prices: *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976); *Fowler Mfg. Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988, 996 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945). Those cases held that damages should be awarded in the minimum amount of

the illegal discriminatory prices which obviously diminished the profits of the disfavored purchaser and helped to destroy its financial ability to withstand competition from the more favored competitors. The court below, in the instant case, although admitting that there was some precedential support for permitting damages in the amount indicated by the sum of the price discrimination, failed to follow those precedents.

There was more than ample evidence, as set forth in the statement of facts in this Petition, that showed damage to Payne's business. The market in which Payne competed was one of exceedingly tough competition where customers compared the prices of the various competing automobile dealers. The amount of price discrimination on the various automobiles on which Chrysler reduced the price to Payne's competitors was substantial, sometimes as much as $300 per car.[4] Since the price discriminations were substantial, compared to the dealer's profit on a typical sale, and Payne's business showed losses during the relevant time frame which were not attributable to causes other than the price discrimination, the case law is clear that damage to Payne's business should be inferred. *F.T.C. v. Morton Salt Co., supra.,* at 50; *American Motors Corp. v. F.T.C.,* 384 F.2d 247 (6th Cir. 1967), *cert. denied,* 390 U.S. 1012 (1968); *Perkins v. Standard Oil Co., supra.; Hanson v. Pittsburg Plate Glass Industries, Inc., supra.* at 227; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra.; Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 143 (1968); *Bargain Car Wash, Inc. v. Standard Oil Co.* (Ind.), 466 F.2d 1163 (7th Cir. 1972); *Foremost Dairies, Inc. v. F.T.C., supra.; E. Edelmann & Co. v. F.T.C.,* 239 F.2d 152 (7th Cir. 1956).

---

[4]See for example plaintiff's exhibit 52, attached to the Appendix at page 25.

The Fifth Circuit refused to apply the principles of the above cited cases in this instance because, according to the court, there cannot be an inference of damage in a private case unless there is proof of actual lost sales. Such reasoning imposes on the plaintiff the almost impossible burden of "proving a negative", i.e. that plaintiff may only recover if it can prove no sale, and hence no profits, because a favored dealer used its anticipated favorable price discrimination to lower the retail price for the car to the consumer. Actually, this reasoning overlooks the crucial fact that Payne was reducing its sale's price and over-allowing on its used car trade-ins in order to maintain its sales. Thus, there might not have been a substantial loss of sales that could be shown by statistical evidence; but there could have been a substantial loss (for instance on the sale of used cars) and a lessening of Payne's capital position and ability to compete against its competitors. These latter facts were proved, as well as the fact that the price discrimination was one of the factors causing Payne to go out of business. *See, e.g.* Tr. 97-100, 706; *See also,* Tr. 539, 593-599 where Chrysler's own witness claims that Payne lost money on its used car operations causing it to go out of business.

This case, therefore, is of nationwide importance in determining whether the principles of law under *Morton Salt* and its descendants are still applicable in a private anti-trust case. In addition to the question involving the *Morton Salt* principles of law, the admitted split among the circuits on whether damages can be at *least* the amount of the illegal price discrimination should impel the Court to grant the Writ of *Certiorari* to the Fifth Circuit Court of Appeals.

ARGUMENT

I. The Fact Of Damage Was Proved.

In *Perkins v. Standard Oil Company, supra,* the Court specifically held that if there is any evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination. (*Id.* at 648). The jury in the instant case concluded that Chrysler's rebate programs caused damage to Payne. Payne more than met the burden of showing just an inference of damage; it proved by direct evidence the fact of damage. The following items of proof were presented to the jury showing that there was, in fact, damage caused by the anti-trust violations of Chrysler's rebate programs:

(1) Dr. George Ignatin testified that Payne would not have gone out of business had it not been for the price discrimination to it in the rebate programs. (Tr. 706). The going concern value of Payne at that time was $170,000 (Tr. 210-218).

(2) Dr. George Ignatin testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite as far as they would otherwise have done had Payne not been charged a higher price. Payne's competitors were able to get better profits by virtue of being sold the cars by Chrysler at a lower price and being able to reduce the price to the consumer easier than Payne. (Tr. 203-204). This hurt Payne's ability to compete in this tough market (Tr. 202-203), eventually being a cause of its demise.

(3) Mr. J. Truett Payne, President and chief operating officer of his company, testified that in selling new cars,

Payne had to "over-allow" on the used car trade-ins in order to obtain business and Payne also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales. (Tr. 65-67, 91-92, 94-95, 126-127). He also testified that the rebate programs were one of the causes of Payne going out of business (Tr. 68-69, 100).

(4) Because of this "over-allowing" on trade-ins, Payne lost money on its used car operations (Tr. 97-100, 539, 593-599) which caused the line of credit extended by Chrysler Credit Corporation to be withdrawn. This lessened Payne's capital position and weakened its ability to compete in a market of very keen competition with other Chrysler-Plymouth dealers.

There was evidence of keen competition in the market (Tr. 44-46, 124) and large rebate payments by Chrysler to Payne's competitors on the various programs, sometimes as much as $300 per car. (See for example the analysis of the "Super Earnings" rebate program which shows the results of the rebate payments to the various dealers under that program, Appendix p. 25). Such evidence is enough by itself for a jury to infer damage under the *Morton Salt* and *Hanson* cases. Therefore, it is clear that there was substantial evidence in the record to permit the jury to find, as it did, causation of actual injury to Payne's business by the Chrysler rebate programs. At the very least, the jury could have found an inference of injury to Payne's business where the market was one of keen competition and the price differentials on the cars were substantial. Numerous cases hold it is the jury's prerogative to infer damage from the price discrimination in such a situation. *Perkins v. Standard Oil Co., supra; Zenith Radio Corp. v. Hazeltine Research, Inc., supra* at 124; *Perma Life Mufflers, Inc. v. International Parts Corp., supra* at 143; *F.T.C. v. Morton Salt Company, supra* at 49; *Bargain Car Wash, Inc. v. Stan-*

dard Oil Co., 466 F.2d 1163 (7th Cir. 1972); *Foremost Dairies, Inc. v. F.T.C.*, 348 F.2d 674 (5th Cir. 1965); *E. Edelmann & Co. v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956).

The Fifth Circuit mentioned that Payne's share of the retail market in Birmingham does not show a substantial reduction which could be attributable to the price discrimination, therefore, showing a loss of customers. However, Payne's testimony was to the effect that in order to *keep* business, it had to over-allow on trade-ins and reduce its gross profit in the sale of new cars. Therefore, Payne's share of the new car market might not have diminished substantially. What was diminished was Payne's profits and Payne's ability to compete in the market place, so much so that it was caused to go out of business.

The Fifth Circuit states that Payne misapplies the holding of *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948), because inference of damage in a public case from the "substantial price difference" does not necessarily show inference of damage in a private case. Having indicated some doubts as to viability of *Morton Salt,* the court said that mere proof of substantial price difference is not sufficient to show the fact of damage.

The Supreme Court, in *Morton Salt* stated the test applicable to both public and private cases:

> . . . the competitive opportunities of certain merchants were injured when they had to pay [seller] substantially more for their goods than their competitors had to pay.

(334 U.S. at 46-47)

In addition, this Court held that a merchant compelled to pay a higher price would actually be injured competitively. (*Id.* at 48)

Contrary to the Fifth Circuit's opinion, it has previously accepted as recently as 1973 the viability of the principle that damage is inferred from price differentials, as set out so clearly in *Morton Salt*. In *Hanson v. Pittsburg Plate Glass Industries, Inc., supra* at 227, the court stated:

> Nevertheless competitive injury may be inferred when one set of customers buys at *substantially lower* prices than other customers. *Federal Trade Comm'n v. Morton Salt Co.* . . . . (emphasis added)

That the favored dealers during each rebate program got substantially lower prices than Payne cannot be denied. True, the payment from Chrysler usually came after a dealer made a wholesale purchase or retail sale; but that payment nonetheless reduced the cost of the new car to the dealer. Therefore, *Morton Salt* is directly applicable to show not only competitive injury, but damage to the non-favored purchaser. To otherwise argue would clearly be unrealistic because when one business can obtain its inventory at a lower price than another competitor, it matters not whether the favored business uses its lesser cost to reduce the ultimate price to the consumer or pockets the difference to weather the uncertainties of competition and the economy. The net result will always be, as it was in the case involving Payne, that the price discriminations have a significant impact on the vigor and health of the non-favored business, injure its competitive opportunities, and cause it damage in actual fact. Actual lost sales may or may not also be the effect of the discrimination.

Additionally, the Fifth Circuit in *Foremost Dairies, Inc. v. F.T.C., supra* at 680, held that "an inference of injury may be properly indulged" where the price discrimination, even though *not* reflected in the retail sales price, if reflected in the sales price would have affected the consumer decision to purchase. As previously mentioned, the rebates

sometimes were as high as $300 per car. Clearly, a price difference of $300 on a consumer's single most important purchase of personal property is more than ample to affect the consumer's decision to purchase. Therefore, Payne is not merely relying, as the court implied in its opinion, on a price difference. Rather Payne is relying on testimony of (1) the adverse effect that the price differences had on competition (2) on Payne's ability to compete being reduced considerably in the tough market (3) on the large price differentials (4) on the fact that Payne had to over-allow on used cars and reduce his gross profit on new car sales because of its competitors receiving cars at less cost (5) on the fact that Payne lost money, and (6) on the fact that the rebate programs were one of the causes of its going out of business. It could be said that Payne was selling more, but enjoying it [profits] less.

II. Amount Of Damage

There is substantial case law, some cited by the Fifth Circuit in its opinion in this case, supporting the rule that in a market of keen competition the amount of the illegal price differential will be the minimum damage to the non-favored purchaser. However, the Fifth Circuit failed to even cite or follow two cases directly in point: *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947) and *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, *aff'd.*, 187 F.2d 919 (5th Cir.), modified on other grounds and rehearing denied, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951).

The Supreme Court has held in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757, that the amount of the damages are at least the amount of price discrimination:

> For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover

> *three times the discriminatory difference without proving more than the illegality of the prices.* If the prices are illegally discriminatory, the petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination. (emphasis added)

The district court in *Bruce's Juices v. American Can Co., supra,* stated emphatically on remand:

> This discrimination in favor of the plaintiff's above-named competitors was manifestly harmful to plaintiff's business, for the reason that the cost of juice cans represented a large percentage of the total cost of this citrus product, and the discriminatory higher price paid by plaintiff for [its cans] diminished its profits and helped *destroy its financial ability to withstand competition.* (emphasis added)

(87 F. Supp. at 990)

The Fifth Circuit affirmed the district court's decision at 187 F.2d 919.

As any retail seller knows, if his competitor obtains the product from the manufacturer at a cheaper price, it will certainly be to that competitor's advantage in the marketplace, making it easier for that competitor to draw customers away from the disfavored retail seller and to withstand the fluctuations of spirited competition. It does not matter whether or not the competitor uses the price difference to lower the price of the product, to award as an incentive to his salesmen to do a better job in selling customers, to hire an advertising agency to draw customers to the favored competitor, or for extra profit. The end result of using the favored price difference will always be that the favored competitor will enhance his capital position and be better able to compete in the marketplace *at the expense of* the disfavored seller. The disfavored seller will suffer by losing customers or dropping out of business in the lean years and

weak markets, while the favored competitor has become strong enough to survive during weak market with periods of losses. Such is the instant case where Payne was forced out of business not so much by lost sales, but by a weaker capital position and continuing losses created by Chrysler's price discrimination.

In the instant case, evidence was presented to the jury that Payne's ability to compete and withstand the competitive forces in the market was drastically lowered by virtue of the price discrimination in the rebates paid by Chrysler to Payne's competitors. (Tr. 65-67, 203). The amount of the price differential favoring Payne's competitors on their purchase of new automobiles was $81,248.94, a substantial amount of money by any company's standards. This Court, at the very least, should adopt the rule, previously adopted by it in *Bruce's Juices v. American Can Co., supra,* which permits the plaintiff to recover damages for illegal price discrimination at least in the amount of the price differential.

The precepts of the Supreme Court's *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), referred to the opinion of the Fifth Circuit, do not prohibit Payne from recovering damages for the price differential. To the contrary, the *Brunswick Corp.* case, if applicable at all, supports Payne. In that case, the Court held that the plaintiffs were not damaged in their business by reason of the defendant's acquisition of failing companies in violation of Section 7 of the Clayton Act. The plaintiffs there had claimed that, were it not for the prohibited acquisition, they would have obtained *more* business through the customers of the failing companies after those companies had failed. When the defendant acquired those companies, the business did not go to the plaintiffs. The court held that anti-trust laws provided a damage remedy for losses directly resulting from the violation of the antitrust laws and not for every single

violation if there was not the proximate cause connection. The loss of future additional customers was so remote that it was not a loss contemplated as being "caused" by the violation of the Clayton Act. For all practical purposes, the *Brunswick* case was a proximate cause case, holding that the damages claimed by plaintiffs were too far removed and not caused by the antitrust violation.

In the instant case, it is clear that the rebate programs directly caused Payne two separate categories of damage redressable under the Robinson-Patman Act: (1) reduction of profits on current sales, i.e., loss of profits by over-allowing on used cars and selling retail at lower prices in order to retain business, and (2) the going concern value of Payne's business which the rebate programs caused to fail. The going concern value of Payne was approximately $170,000. (Tr. 210-218). Clearly, the above injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act was designed to compensate.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of antitrust laws, all that plaintiff must do is show "some indication of the amount of the damage done."[5] *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Payne clearly showed substantial evidence that it had been damaged by virtue of Chrysler's rebate programs favoring Payne's competitors. Therefore, one "indication" of the amount of damage would be the price differential.

[5]In the Fifth Circuit's opinion in this case, the court erroneously set a higher standard of proof by saying that the plaintiff must show "at least the *approximate amount* of the damage". That higher standard is not appropriate in this case.

The trial court charged the jury that the amount of the price differential could be considered by it in determining the amount of any damage that it might find Payne suffered, but that amount was not automatically the amount of any damage. (Tr. 806-807). The Fifth Circuit held that there was not substantial evidence proving actual damage to Payne. If this Court feels that the damages for the loss of Payne's business—that is the going concern value—might be too speculative, *at the very least* this Court should not permit the Fifth Circuit's reversal to stand since it prohibits a new trial on the issue of the amount of damages. This Court, at the very minimum, should permit a new trial on the issue of damages so that the jury could consider the price differential and determine what damages, if any, to award.

If this Court adheres to the Fifth Circuit opinion and rejects the price differential damage cases cited in that opinion,[6] the Court would destroy antitrust plaintiffs' abilities to enforce the anti-trust laws. In effect, this Court would be requiring that Payne prove by *direct* evidence (as opposed to inferential evidence) a negative, i.e. that Payne lost sales and the amounts of those lost sales. This burden is not appropriate in this type of case where a disfavored seller strives to retain sales by reducing its profits and overallowing on the trade-ins. Payne's injury to its business is just as severe in this case where no lost *sales* may be shown, but a continuing loss in profits is caused by the illegal price discrimination.

---

[6]In its opinion, the Fifth Circuit cited numerous cases supporting what it called the "Robinson-Patman automatic damages concept." However, the court stated that it declined to follow that rule, although admitting there was substantial precedential support. *See, Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988, 996 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976).

CONCLUSION

The issues presented here are substantial and of nationwide importance. The Fifth Circuit's opinion has effectively undermined the application of the damage rule in one of the most important anti-trust decisions that this Court has ever rendered, *F.T.C. v. Morton Salt Co., supra.* If allowed to stand, the Fifth Circuit's decision will dramatically affect the ability of private anti-trust plaintiffs to redress legitimate grievances.

Not only has the Fifth Circuit misapplied the law with respect to the fact of damage, but it refuses to accept the Supreme Court's decision in *Bruce's Juices v. American Can Co., supra,* and other circuit court decisions permitting, at a minimum, an award of damages to the disfavored purchaser in the amount of the illegal price discrimination. The very nature of the Robinson-Patman Act, prohibiting price discriminations, would make its enforcement a hollow and empty shell if a plaintiff were required to prove specific lost sales and specific lost profits resulting from the price discrimination. It would be almost impossible to prove a negative, i.e. that the disfavored purchaser lost a specific sale because its more favored competitor used a price discrimination to reduce the sales price to the customer. Actually, that favored competitor might use the price discrimination to enhance its capital position to withstand losses which inevitably occur to dealers during weaker markets. Therefore, once the fact of damage is proved from substantial price discrimination, the most effective way of insuring enforcement of the Robinson-Patman Act is to permit damage awards in the amount, at least, of the price differential.

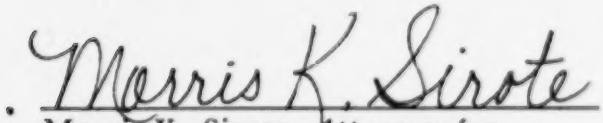
In the instant case Payne not only proved the fact of damage and showed the substantial amounts of price discrimi-

nation, but it also proved that the price discrimination was one of the causes that put it out of business. In such case, Payne is entitled to at least the amount of the price discrimination; and if not overly speculative, it is also entitled to the jury's award of its going concern value above and beyond the amount of the price discrimination. Both of these elements of damage were ignored by the Fifth Circuit's opinion reversing the District Court.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.



Morris K. Sirote, *Attorney for*
J. Truett Payne Company, Inc.,
Petitioner

2222 Arlington Avenue South
P. O. Box 3364-A
Birmingham, Alabama 35205
[205] 933-7111

PROOF OF SERVICE

I, Morris K. Sirote, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 9th day of ~~April~~ June, 1980, I served copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. J. Fredric Ingram and Hon. J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorneys for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the 9th day of ~~April~~ June, 1980.

Morris K. Sirote

Morris K. Sirote
Attorney for J. Truett Payne Company, Inc., Petitioner

2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

Supreme Court, U.S.
FILED
JUN 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

NO. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

MORRIS K. SIROTE
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111
Counsel for Petitioner

Of Counsel:
SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

TABLE OF CONTENTS

	Page
Fifth Circuit Opinion	1
Fifth Circuit Denial of Rehearing	7
District Court Judgment	8
Charts	10
15 U.S.C. §13	28
15 U.S.C. §15	29

INTRODUCTION

The abbreviation used throughout the Charts, pages 10 through 27, are set forth below:

C/L	- Car Line
CEN.	- Central Motors
Diff. and Difference	- Price Differential to J. Truett Payne
El.	- Eligible
JTP	- J. Truett Payne
Obj.	- Objective
P.U.	- Per Unit
Pur.	- Purchase
Reb.	- Rebate
ROE.	- Roebuck Chrysler-Plymouth
VEST.	- Vestavia Chrysler-Plymouth
W/S	- Wholesale

CHRYSLER CREDIT CORPORATION, a corporation, Plaintiff,

v.

J. TRUETT PAYNE, INC., etc., et al., Defendants-Third Party Plaintiffs-Appellees,

v.

CHRYSLER MOTORS CORPORATION, a corporation, Third Party Defendant-Additional Party Defendant-Appellant.

No. 77-2331.

United States Court of Appeals, Fifth Circuit.

Dec. 7, 1979.

Former automobile dealership brought action against automobile wholesaler alleging price discrimination in violation of Robinson-Patman Act. The United States District Court for the Northern District of Alabama, Seybourne H. Lynne, J., entered judgment for dealership, and wholesaler appealed. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that since dealership failed to introduce substantial evidence of injury attributable to alleged discriminatory incentive programs of wholesaler, much less substantial evidence of amount of such injury, dealership failed to establish case entitling it to recover treble damages.

Reversed and remanded with directions.

1. Monopolies ⇐28(9)

In order to recover treble damages under provision of Clayton Act, plaintiff must prove a violation of antitrust laws, cognizable injury attributable to violation, and at least the approximate amount of damage. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Trade Regulation ⇐929

Former automobile dealership failed to introduce substantial evidence of injury attributable to alleged discriminatory incentive programs of automobile wholesaler, much less substantial evidence of amount of such injury, in action against automobile wholesaler for price discrimination in violation of Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

3. Monopolies ⇐28(7.6)

Conclusory statements by plaintiff, without evidentiary support, as to fact of damage caused by alleged antitrust violation are not sufficient to entitle plaintiff to recover treble damages under Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

4. Trade Regulation ⇐929

Evidence of a slight decrease in market share roughly coincident with alleged violation of Robinson-Patman Act is not sufficient to entitle plaintiff to recover treble damages under Clayton Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a); Clayton Act, § 4, 15 U.S.C.A. § 15.

5. Trade Regulation ⇐929

Mere proof of alleged price discrimination in violation of Robinson-Patman Act is insufficient to establish injury by reason of antitrust violation entitling plaintiff to damages. Clayton Act, § 2(a) as amended by Robinson-Patman

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1979, by WEST PUBLISHING CO.

Price Discrimination Act, 15 U.S.C.A. § 13(a).

6. Monopolies ⇐28(9)

Antitrust laws do not provide a damages remedy for all losses traceable to conduct violating antitrust laws, only for losses that are part of anticompetitive effect of such conduct. Clayton Act, § 4, 15 U.S.C.A. § 15.

7. Trade Regulation ⇐913

Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate Robinson-Patman Act even though it will not support an action for damages. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

8. Trade Regulation ⇐931

In order to recover damages for violation of Robinson-Patman Act, plaintiff must show more than just a threat of antitrust injury. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

9. Trade Regulation ⇐929

In antitrust action for alleged violation of Robinson-Patman Act, burden of proving amount of damages is less severe than burden of proving cognizable injury; however, plaintiff must put forth substantial evidence and burden is not satisfied by mere speculation or guesswork. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

10. Trade Regulation ⇐929

A price difference in violation of Robinson-Patman Act, without more, does not indicate amount of lost sales or profits for purposes of recovery of damages. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

11. Trade Regulation ⇐929

Self-serving or unsupported assumptions cannot sustain a calculation of going concern value in an action for price discrimination in violation of Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment awarded against Chrysler Motors Corporation for price discrimination in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

1. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ."

From January 1970 through August 1974, the period at issue, Chrysler Motors was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne, Inc., was one of four such dealerships in the Birmingham, Alabama, area.

Payne went out of business in May 1974. In September 1974, Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans. Part of Payne's response was the filing of this price discrimination claim against Chrysler Motors.

Payne alleged that as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, Payne had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. Payne sought treble damages under section 4 of the Clayton Act.[2]

In defense, Chrysler Motors maintained that the sales incentive programs were available on a non-discriminatory basis to all Chrysler dealerships in the Birmingham area, including Payne, and denied that they had had an adverse effect on competition or that they had injured Payne.

The district judge severed trial of this Chrysler Motors issue from trial of the Chrysler Credit issues. Testimony was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all the evidence were denied. The jury reached a verdict and award against Chrysler of $111,247.48 (Payne had asked for $180,000), which the court trebled. Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied, and Chrysler filed this appeal.

[1] It is well established that in order to recover treble damages under section 4 of the Clayton Act, a plaintiff most prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

[2] We find it unnecessary to consider whether Payne proved that the Chrysler incentive programs violated the Robinson-Patman Act. Because Payne failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, the district court

2. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

erred in refusing Chrysler's motions for directed verdict and in denying Chrysler's motion for judgment notwithstanding the verdict.

I. Cognizable Injury

To show that Chrysler's incentive programs caused it to lose sales, Payne introduced the unsupported testimony of J. Truett Payne, its owner, that customers and salesmen had told him that the dealership was being undersold, and that some salesmen had quit as a result. Payne also introduced evidence showing that its share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contends that it was proper to infer that the 4% drop in 1972 was a result of the incentive program.[3]

To show lost profits by reason of the programs, Payne introduced only the unsupported testimony of Mr. Payne that he was forced to lower prices in order to meet competition and that for the same reason the dealership had to, or possibly had to, give greater allowances on used-car trade-ins.

In an effort to show that the programs forced the dealership out of business, Payne relied on merely conclusory statements to that effect by Mr. Payne and an expert witness.[4]

[3, 4] Under *Boeing Co. v. Shipman*, 411 F.2d 365, 373–77 (5th Cir. 1969) (en banc) (standard for directed verdict and judgment notwithstanding the verdict), this showing was clearly not such as to allow the case to go to the jury. In an antitrust action, as noted above, the plaintiff must show that the defendant's conduct materially contributed to his injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). He must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau*, *supra*, 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either.[5] The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e. g., Comfort-Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418–20 (5th Cir.

3. Payne also contends that the 2% increase in 1973 was the result of a 1973 revision of the incentive programs that resulted in sales quotas more favorable toward Payne. While it is true that certain of the incentive programs were so revised, none of these types of programs operated in 1973. The 1973 increase cannot be attributed to their revision.

4. The expert prefaced his statement on the issue with the comment, "I really can't tell you without having, you know—it's a hypothetical question."

5. *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 547 (5th Cir. 1978), *cert. filed*, — U.S. ——, 100 S.Ct. ——, — L.Ed.2d —— (1979) (decrease in income, without more, does not establish fact of damage). In this case, as Mr. Payne himself testified, there was evidence that the material cause of the 4% decrease in market share Payne experienced in 1972 was the relocation of a competing Chrysler-Plymouth dealer into Payne's immediate sales area, and not the Chrysler incentive programs.

1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975).

[5, 6] Payne maintains on this appeal that in a section 2(a) case mere proof of the alleged price discrimination is sufficient to establish injury by reason of an antitrust violation entitling the plaintiff to damages. This Robinson-Patman "automatic damages" concept, as it has come to be called, has some precedential support. *See Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945). But we decline to follow it. As the Supreme Court ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the antitrust laws do not provide a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this. 15 U.S.C. § 13(a). *See, e. g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e. g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 357–59 (S.D.N.Y.1978); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D. Ala.1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); Handler, *Changing Trends in Antitrust Doctrines*, 77 *Colum.L.Rev.* 979, 992–93 (1977). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648–49, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (implying that disfavored purchaser must show more than mere price difference to recover damages). As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

[7, 8] Payne's reliance on *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is misplaced. In *Morton Salt*, the Supreme Court held that a violation of Robinson-Patman Act § 2(a) may be inferred from a substantial price difference. 334 U.S. at 46–47, 68 S.Ct. 822. But the showing necessary to establish a section 2(a) violation is not the same as the showing necessary to support a private action for damages. The Robinson-Patman Act is an incipiency statute.[6] Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 *Harv.L.Rev.* 1127, 1127–28 (1976). *See also Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 403 U.S. 911, 91 S.Ct. 2208, 29 L.Ed.2d 689 (1971) (private inju-

6. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), proscribes price discrimination "where the effect of such discrimination *may* be substantially to lessen competition . . . ." (Emphasis added).

ry does not necessarily accompany public injury). What *Morton Salt* found inferable from a substantial price difference was a threat to competition sufficient to violate the statute. 334 U.S. at 46–47, 68 S.Ct. 822. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury. As discussed above, it failed to do so.

II. Amount of Damage

Our conclusion that Chrysler was entitled to a directed verdict is buttressed by Payne's failure to adequately prove the amount of its alleged injury.

Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one.

To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20 years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

[9–11] As was the case with Payne's fact of damage evidence, this showing was clearly not such as to allow the case to go to the jury. In an antitrust damages action, as noted above, the plaintiff must establish the amount as well as the fact of damage. The burden of proving the amount of damage is less severe than the burden of proving the cognizable injury. *See, e. g., Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 23–24. But the plaintiff must put forth substantial evidence. The burden is not satisfied by mere speculation or guess work. *See, e. g., Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 815, 90 L.Ed. 1040 (1946); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979). Payne failed to meet this burden. A price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going concern value. On this ground as well, Chrysler was entitled to a directed verdict. *See, e. g., Kestenbaum v. Falstaff Brewing Corp., supra*, 514 F.2d at 695; *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 953–55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-2331

U.S. COURT OF APPEALS
FILED
MAR 1 1980
GILBERT F. GANUCHEAU
CLERK

CHRYSLER CREDIT CORPORATION,
A Corporation,

Plaintiff,

versus

J. TRUETT PAYNE, INC., ETC., ET AL.

Defendants-Third Party Plaintiffs,
Appellees,

versus

CHRYSLER MOTORS CORPORATION,
A Corporation,

Third Party Defendant-Additional
Party Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion December 7, 1979, 5 Cir., 197_, _____F.2d_____).

(March 18, 1980)

Before GODBOLD, RONEY and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

CHRYSLER CREDIT CORPORATION, a corporation, Plaintiff, vs. J. TRUETT PAYNE CO., INC., a corporation; J. TRUETT PAYNE; BLANCHE P. PAYNE, Defendants and 3d Party Plaintiffs, CHRYSLER MOTORS CORPORATION, a corporation, 3d Party Defendant and Additional Party-Defendant	)	CIVIL ACTION NO. 74-L-891-S

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
APR 28 1977
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY:

O R D E R

On March 23, 1977, the jury to which this action was tried returned the following verdict:

"We, the jury, find for the defendants and third-party plaintiffs, J. Truett Payne Co., Inc., a corporation, J. Truett Payne, Blanche P. Payne, and against the third-party defendant, Chrysler Motors Corporation, a corporation, and assess their damages at $111,247.48."*

Pursuant to the provisions of 15 U.S.C. § 15, the single damages found by the jury are trebled.

Counsel stipulated that a reasonable attorney's fee was to be determined by the Court without the intervention of a jury. By separate order on application of J. Truett Payne Co., Inc., for attorneys' fees and reimbursement of out-of-pocket expenses, the Court has awarded to such applicant reasonable attorneys' fees in the amount of $40,000.

It is accordingly ORDERED, ADJUDGED and DECREED by the

* In the course of the pleadings in this action, the Court treated the third-party complaint against Chrysler Motors Corporation as a counterclaim against Chrysler Credit Corporation, the original plaintiff, to which counterclaim Chrysler Motors Corporation was added as an additional defendant therein.

Court that the defendants and third-party plaintiff, J. Truett Payne Co., Inc., a corporation, have and recover of the third-party defendant, Chrysler Motors Corporation, a corporation, the sum of THREE HUNDRED THIRTY-THREE THOUSAND, SEVEN HUNDRED FORTY-TWO AND 44/100 DOLLARS ($333,742.44), together with a reasonable attorney's fee in the amount of $40,000, and the costs of court incurred herein.

DONE this 28th day of April, 1977.

[redacted]
SENIOR JUDGE

W I N T E R W I N N E R S

11/11/70 - 1/31/71

Paid on Sales After W/S Obj. Attained

Pur. Obj.	C/L Group	JTP Sales	JTP Reb./P.U.	All Others Reb./P.U.	Diff.
JTP - 99	Val-Bar	17	0	30	510
Central - 63	Bel-Sat	13	0	45	585
Bessemer - 39	Ch-Imp	42	0	60	2,520
Roebuck - 54	Fury	17	0	45	765
	Fy W/O	15	0	60	900
					$ 5,280

W I N T E R W I N N E R S

11/11/70 - 12/31/70

(Floor Plan Rebates Portion - Paid on Purchase)

	Rebates P.U.	Purchases
JTP	$ -0-	72
Central	26.30	77
Bessemer	26.57	48
Roebuck	41.05	95

TOTAL REBATES JTP WOULD HAVE RECEIVED - $2,955.60

1971 BIG DOLLAR PAYOFF

1/1/71 - 4/30/71

Rebates paid on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	51	28.43	54.03	$1,305.65
Others	163	107.98	35.59	(NEG.)

1971 BIG DOLLAR PAYOFF

1/1/71 - 3/31/71

(Floor Plan Rebates Portion-Paid on Purchases)

	Reb./P.U.	Purchases
JTP	$ 26.38	188
Central	.49	109
Bessemer	26.00	98
Roebuck	30.81	129

Total rebate JTP would have received - $5,792.88

JTP received $4,800.00. Difference - $ 992.28

S U M M E R S E L L O U T

3/1/71 - Fall, 1971

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	110	$ 9.41	$25.00	$ 1,715.00
Bar-Sat-Fy	103	11.65	60.00	4,980.00
Ch-Imp	61	13.20	70.00	3,465.00
				$10,160.00

W I N T E R P R O F I T D A Y S

11/21/71 - 1/31/72

Paid on Sales After W/S Obj. Attained.

C/L Group	JTP Sales	JTP Reb./P.U.	ROE+VEST Reb./P.U.	Difference
1972 Val-Bar	28	-0-	$ 35.00	$ 980.00
Sat	10	-0-	55.00	550.00
Fy-Ch-Imp	43	-0-	65.00	2,795.00
1971 Val-Bar	8	-0-	70.00	560.00
Sat	7	-0-	-0-	
Fy-Ch-Imp	15	-0-	130.00	1,950.00
				$6,835.00

S T O C K E L I M I N A T O R

8/11/71 - 1/31/72

Rebates Paid on All ~~Sales~~ Cars

C/L Group	JTP Sales	JTP Reb./P.U.	Hall Reb./P.U.	Difference
Compact	40	$ 68.75	$ 68.18	(NEG.)
Other	108	100.00	100.00	

C H R Y S L E R - P L Y M O U T H S E L L N O W

1/1/72 - 4/30/72

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Vestavia Cen+Roe Reb./P.U.	Difference
Val-Bar	81	$17.72	$35.00	$1,400.00
Sat	30	14.67	55.00	1,210.00
Fy-Ch-Imp	72	52.22	65.00	920.00
				$ 3,530.00

CHRY/FY PROFIT PROGRAM

1/1/72 - 3/31/72

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Bessemer Reb./P.U.	Diff.
70	$10.00	$82.76	$5,093.10

CASH IN WITH CHRYSLER

5/1/72 - 6/30/72

Rebate Paid on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
31	$25.81	$80.43	$1,693.48

C L E A N - U P A N D C A S H I N

7/1/72 - Fall 1972

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
86	$39.53	$94.44	$4,722.22

1 9 7 2 S U M M E R S W E E P S T A K E S

4/1/72 - 7/31/72

Rebates on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
Val-Bar	79	$ -0-	$ 42.02	$ 3,319.58
Sat	45	-0-	68.65	3,089.25
Fy-Ch-Imp	140	-0-	110.00	15,400.00
				$21,808.83
JTP received $9,689 stock rebate on 5%/P.U. but would have made $12,119.83 more under terms of rebate program.				- 9,689.00
				$12,119.83

C H R Y S L E R - P L Y M O U T H T R I P L E - P A Y

10/1/72 - 12/31/72

Rebates Paid on Sales

El. Units	JTP Reb./P.U.	Central Reb./P.U.	Difference
152	$6.91	$49.23	$6,432.64

F U R Y - C H R - I M P T W I N D E A L D O L L A R S

1/1/73 - 3/31/73

Rebate Paid on Sales

C/L Group	El. Units	JTP Reb./P.U.	ROE Reb./P.U.	Diff.
(3)	55	$3.636	$78.125	$4,096.88

CHRYSLER-PLYMOUTH EARLY

CLEAN-UP BONUS PROGRAM

6/1/73 - 1974 Model Day

JTP and Central opted for a Non-Discriminatory Program which gave them a 5% rebate on each 1973 Unit.

S U P E R E A R N I N G

1/1/74 - 3/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Roe. Reb./P.U.	Diff.
Val	48	-0-	-0-	-0-
Sat	12	$ 35.00	$100.00	$ 780.00
Ch	19	50.00	150.00	1,900.00
'73 Ch	33	100.00	300.00	6,600.00
				$9,280.00

P R I M E R A T E O N E I G H T S

4/1/74 - 5/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb. Rec'd	Others Reb./P.U.	Diff.
Val	13	-0-	$ 50.00	$ 650.00
Sat	5	-0-	100.00	500.00
Ch	12	-0-	150.00	1,800.00
'73 Ch	19	-0-	200.00	3,800.00
				$6,750.00

"C" BODY BONUS
2/1/74 - 3/31/74
REBATES PAID ON SALES

El. Units	JTP Reb./P. U.	ROE. Reb./P. U.	Diff.
33	$163.64	$90.91	-----

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services

rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

Section 4 of the Clayton Act, 15 U.S.C.A. §15:

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

JOINT APPENDIX

C. LEE REEVES
2222 Arlington Avenue South
Birmingham, Alabama 35255
(205) 933-7111

Counsel for Petitioner

J. ROSS FORMAN, III
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Respondent

TABLE OF CONTENTS

		Page
Relevant Docket Entries		1
Opinion of Fifth Circuit in Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133 (5th Cir. 1979)		2
Excerpts of TRANSCRIPT of the Evidence		
Witnesses:	J. Truett Payne	11-95; 223-225
	George Ignatin	96-166; 222-223
	Leonard J. Piconke	167-190
	Eric W. Lindenberg	190-196
	Martin Geisel	196-221
Exhibits		
Plaintiff's Exhibits No.:	37	228
	38	229
	39	230
	40	231
	41	232
	42	233
	43	234
	44	235
	45	236
	46	237
	47	238
	48	239
	49	240
	50	241
	51	242
	52	243
	53	244
	54	245
	55	246
Defendant's Exhibits No.:	1	247-265
	27	266
	28	267
	31	268-269
	36	270
	37	271
	39	272
	40	273
	41	274
Certificate of Service		275

RELEVANT DOCKET ENTRIES

	Date
Complaint against Chrysler Motors Corporation	Dec. 27, 1974
Answer of Chrysler Motors Corporation	May 14, 1975
District Court Judgment in favor of J. Truett Payne Company and against Chrysler Motors Corporation	April 28, 1977
District Court Order Denying Chrysler Motors Corporation's Motion for Judgment Notwithstanding the Verdict or For New Trial	June 13, 1977
Opinion of Fifth Circuit Court of Appeals Reversing District Court's Judgment	Dec. 7, 1979
Order of Fifth Circuit Court of Appeals Denying J. Truett Payne Company's Petition for Rehearing, or in the Alternative, Petition for Rehearing En Banc	March 18, 1980
Filing of Petition for Certiorari by Petitioner, J. Truett Payne Company	June 10, 1980
Supreme Court's Order Granting J. Truett Payne Company's Petition for Certiorari	Oct. 6, 1980

CHRYSLER CREDIT CORPORATION, a corporation, Plaintiff,

v.

J. TRUETT PAYNE, INC., etc., et al., Defendants-Third Party Plaintiffs-Appellees,

v.

CHRYSLER MOTORS CORPORATION, a corporation, Third Party Defendant-Additional Party Defendant-Appellant.

No. 77-2331.

United States Court of Appeals, Fifth Circuit.

Dec. 7, 1979.

Rehearing and Rehearing En Banc Denied Jan. 18, 1980.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, RONEY and FRANK M. JOHNSON, Jr., Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

This is an appeal from a treble damages judgment awarded against Chrysler Motors Corporation for price discrimination in violation of section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

---

[1]Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (a), provides in part as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

From January 1970 through August 1974, the period at issue, Chrysler Motors was a wholly owned subsidiary of Chrysler Corporation, engaged in wholesaling Chrysler-Plymouth automobiles to retail dealerships throughout the country. J. Truett Payne, Inc., was one of four such dealerships in the Birmingham, Alabama, area.

Payne went out of business in May 1974. In September 1974, Chrysler Credit Corporation filed suit for the recovery of certain unrepaid loans. Part of Payne's response was the filing of this price discrimination claim against Chrysler Motors.

Payne alleged that as a result of certain discriminatory sales incentive programs conducted by Chrysler Motors among its dealerships in the Birmingham area, Payne had been forced to pay higher prices for Chrysler automobiles than had its competitors. Payne claimed that because of the higher prices it lost sales and profits, and was eventually forced out of business. Payne sought treble damages under section 4 of the Clayton Act.[2]

In defense, Chrysler Motors maintained that the sales incentive programs were available on a non-discriminatory basis to all Chrysler dealerships in the Birmingham area, including Payne, and denied that they had had an adverse effect on competition or that they had injured Payne.

The district judge severed trial of this Chrysler Motors issue from trial of the Chrysler Credit issues. Testimony

---

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . ."

[2]Section 4 of the Clayton Act, 15 U.S.C. § 15, provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

was taken for six days. Chrysler's motions for a directed verdict made at the close of Payne's case and at the close of all the evidence were denied. The jury reached a verdict and award against Chrysler of $111,247.48 (Payne had asked for $180,000), which the court trebled. Chrysler's motion for judgment notwithstanding the verdict or for a new trial was denied, and Chrysler filed this appeal.

[1] It is well established that in order to recover treble damages under section 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of the damage. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 694 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1412, 47 L.Ed.2d 349 (1976); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974).

[2] We find it unnecessary to consider whether Payne proved that the Chrysler incentive programs violated the Robinson-Patman Act. Because Payne failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, the district court erred in refusing Chrysler's motions for directed verdict and in denying Chrysler's motion for judgment notwithstanding the verdict.

I. Cognizable Injury

To show that Chrysler's incentive programs caused it to lose sales, Payne introduced the unsupported testimony of J. Truett Payne, its owner, that customers and salesmen had told him that the dealership was being undersold, and that some salesmen had quit as a result. Payne also introduced

evidence showing that its share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contends that it was proper to infer that the 4% drop in 1972 was a result of the incentive program.[3]

To show lost profits by reason of the programs, Payne introduced only the unsupported testimony of Mr. Payne that he was forced to lower prices in order to meet competition and that for the same reason the dealership had to, or possibly had to, give greater allowances on used-car trade-ins.

In an effort to show that the programs forced the dealership out of business, Payne relied on merely conclusory statements to that effect by Mr. Payne and an expert witness.[4]

[3, 4] Under *Boeing Co. v. Shipman*, 411 F.2d 365, 373-77 (5th Cir. 1969) (en banc) (standard for directed verdict and judgment notwithstanding the verdict), this showing was clearly not such as to allow the case to go to the jury. In an antitrust action, as noted above, the plaintiff must show that the defendant's conduct materially contributed to his injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 23 L.Ed. 2d 129 (1969). He must do so "as a matter of fact and with a fair degree of certainty." *Terrell v. Household Goods Carriers' Bureau, supra*, 494 F.2d at 20. Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation

[3]Payne also contends that the 2% increase in 1973 was the result of a 1973 revision of the incentive programs that resulted in sales quotas more favorable toward Payne. While it is true that certain of the incentive programs were so revised, none of these types of programs operated in 1973. The 1973 increase cannot be attributed to their revision.

[4]The expert prefaced his statement on the issue with the comment, "I really can't tell you without having, you know — it's a hypothetical question."

are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either.[5] The plaintiff must put forth substantial evidence. If he fails to do so, the defendant is entitled to a directed verdict. *See, e. g., Comfort-Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373, 1383 (5th Cir. 1979); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977); *Foremost-McKesson v. Instrumentation Laboratory*, 527 F.2d 417, 418-20 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 153 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975).

[5, 6] Payne maintains on this appeal that in a section 2(a) case mere proof of the alleged price discrimination is sufficient to establish injury by reason of an antitrust violation entitling the plaintiff to damages. This Robinson-Patman "automatic damages" concept, as it has come to be called, has some precedential support. *See Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945). But we decline to follow it. As the Supreme Court ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the antitrust laws do not provide

---

[5] *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 547 (5th Cir. 1978), *cert. denied*, ... U.S. ....., 100 S.Ct. 262, 62 L.Ed.2d 180 (1979) (decrease in income, without more, does not establish fact of damage). In this case, as Mr. Payne himself testified, there was evidence that the material cause of the 4% decrease in market share Payne experienced in 1972 was the relocation of a competing Chrysler-Plymouth dealer into Payne's immediate sales area, and not the Chrysler incentive programs.

a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this. 15 U.S.C. § 13 (a). *See, e. g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e. g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 357-59 (S.D.N.Y. 1978); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D.Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); Handler, *Changing Trends in Antitrust Doctrines*, 77 *Colum.L.Rev.* 979, 992-93 (1977). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (implying that disfavored purchaser must show more than mere price difference to recover damages). As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

[7, 8] Payne's reliance on *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), and its progeny is misplaced. In *Morton Salt*, the Supreme Court held that a violation of Robinson-Patman Act § 2 (a) may be inferred from a substantial price difference. 334 U.S. at 46-47, 68 S.Ct. 822. But the showing necessary to establish a section 2 (a) violation is not the same as the showing necessary to support a private action for damages. The Robin-

son-Patman Act is an incipiency statute.[6] Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages. *See* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 *Harv.L.Rev.* 1127, 1127-28 (1976). *See also Gottesman v. General Motors Corp.,* 436 F.2d 1205, 1210 (2d Cir.), *cert. denied,* 403 U.S. 911, 91 S.Ct. 2208, 29 L. Ed.2d 689 (1971) (private injury does not necessarily accompany public injury). What *Morton Salt* found inferable from a substantial price difference was a threat to competition sufficient to violate the statute. 334 U.S. at 46-47, 68 S.Ct. 822. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order to recover damages, Payne had to show more than just a threat of antitrust injury. As discussed above, it failed to do so.

II. Amount of Damage

Our conclusion that Chrysler was entitled to a directed verdict is buttressed by Payne's failure to adequately prove the amount of its alleged injury.

Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one.

To indicate the going concern value of the dealership at the time it was allegedly forced out of business, Payne relied on two alternative methods of calculation. Under the first, Payne's expert assumed a good will value for the dealership of $52,000 in 1955 and appreciated this amount over 20

[6]Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), proscribes price discrimination "where the effect of such discrimination *may* be substantially to lessen competition. . . ." (Emphasis added).

years at an annual rate of 4%. The expert testified that the $52,000 figure was not based on an examination of Payne's financial statements. It represented an unsupported estimate by Mr. Payne. The 4% rate was a rough average of the prevailing inflation and prime interest rates from 1955 until the time Payne folded. Under the second method, Payne's expert discounted projections of what the dealership's profits would have been if it had continued in business free of the incentive programs. The expert testified that he did not take into account local market changes or conditions. The projections were apparently nothing more than some of Payne's past earnings roughly adjusted according to Chrysler's performance nationwide or the performance of the automobile industry in general. If Chrysler or the industry had a good year it was assumed, without an explanation why, that Payne would have a good year also.

[9-11] As was the case with Payne's fact of damage evidence, this showing was clearly not such as to allow the case to go to the jury. In an antitrust damages action, as noted above, the plaintiff must establish the amount as well as the fact of damage. The burden of proving the amount of damage is less severe than the burden of proving the cognizable injury. *See, e. g., Story Parchment Co. v. Patterson Parchment Co.,* 282 U.S. 555, 562, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Terrell v. Household Goods Carriers' Bureau, supra,* 494 F.2d at 23-24. But the plaintiff must put forth substantial evidence. The burden is not satisfied by mere speculation or guess work. *See, e. g., Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264, 66 S.Ct. 815, 90 L.Ed. 1040 (1946); *Keener v. Sizzler Family Steak Houses,* 597 F.2d 453, 457 (5th Cir. 1979). Payne failed to meet this burden. A price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going

concern value. On this ground as well, Chrysler was entitled to a directed verdict. *See, e. g., Kestenbaum v. Falstaff Brewing Corp., supra,* 514 F.2d at 695; *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934, 953-55 (5th Cir. 1975).

The district court is directed to enter judgment for Chrysler.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN TRUETT PAYNE

[TR. 40]

Q. And when is the first time you became a Chrysler direct dealer?

A. In 1944 or '45.

Q. Where were you located, Mr. Payne?

A. 408 South 21st Street in Birmingham.

Q. How long had you or did you remain in that location?

A. About ten years.

Q. And were you selling Chryslers after you moved from that location?

[TR. 41]

A. Yes, sir.

Q. Excuse me. When did you acquire the J. Truett Payne Company?

A. Well, we bought out Leseur Motors in 1955 and merged the two companies.

Q. Now, in 1965 were you selling Chrysler automobiles, your company?

A. Yes, sir.

Q. Was Leseur?

A. Yes, sir.

Q. And what was the price, or the purchase price that you paid for this buying of the Leseur Motors?

A. I believe I paid forty-five thousand dollars for his fixtures and what equipment he had in parts.

Q. All right. Was there anything else included in that price?

A. No, sir.

Q. Out of that price, Mr. Payne, that you paid for Leseur, did he have forty-five thousand dollars worth of parts and fixtures on hand or was there anything else in that price?

A. No. I would believe that, as well as I remember, that about half of

that would be for equipment and parts and the other half for goodwill, I guess.

Q. Had he been in business a while?

[TR. 42]

A. Several years. I don't remember how long.

Q. All right. In any event, you bought him out and you started selling Chryslers with his inventory, is that correct?

A. Yes, sir.

Q. Did you have an inventory of your own?

A. I had an inventory of my own and then we took over some cars that he had, but we bought them from Chrysler.

Q. All right. What was the net worth of your business at that time, J. Truett Payne Company, the Chrysler dealer?

A. I would think around seventy-five

hundred or a thousand dollars. I don't know.

Q. Was any of that portion of that business amount made up of goodwill or was it all stock merchandise, parts?

A. In mine?

Q. Yes, sir, in yours.

A. I would say it was all in merchandise.

Q. All right. Since 1955 did you operate J. Truett Payne Company Chrysler-Plymouth dealership just like you operated it through 1974? Have you been operating it --

A. Yes.

[TR. 43]

Q. -- since 1955 with Chrysler?

A. Yes, sir.

Q. When did you terminate your dealership relationship with Chrysler Motors?

A. I believe it was in May of '74.

Q. All right. Prior to that time in the 1960's, in the early '60's, beginning of that decade, were you the only Chrysler Plymouth dealer in the Birmingham area or was there any other dealership?

A. Well, there had been dealers in Bessemer, but I believe we were -- what time are you --

Q. In 1960.

A. Well, I believe I was the only Chrysler dealer in downtown Birmingham until -- I don't know, when they put Central Motors in. Was it in '61?

Q. Well, in your best judgment, do you know? When they put in Central Motors, is that correct?

A. Yes, it was the first dealer they put in.

Q. After they put in Central Motors

there was you and Central Motors, is that correct?

A. Yes. When they put Central Motors in, they put them in originally as Plymouth only. They did not give them Chrysler and Imperial. It was just when they originally opened up, they opened up with Plymouth.

[TR. 44]

Q. And subsequent to that time did they acquire Chrysler and Imperial?

A. Sir?

Q. Did they start selling Chrysler and Imperials after that?

A. At a later date, yes.

Q. All right. During 1970 through 1974 you were selling, your company was selling Chryslers and Imperials and Plymouths, correct?

A. Yes, yes.

Q. Can you tell the ladies and

gentlemen of the jury what other dealers during that time, direct dealers, were selling Chryslers, Plymouths in the Birmingham area?

A. From '70 until --

Q. '74.

A. Well, I believe it was Roebuck, Roebuck Chrysler Plymouth, Vestavia Chrysler Plymouth, and Central Motors.

Q. All right. And yourself?

A. And us, yes.

Q. Can you tell the ladies and gentlemen of the jury who were your competitors in your market in the Birmingham market area for selling Chrysler and Plymouth automobiles during that time period?

[TR. 45]

A. It would have been Roebuck Chrysler, Central Motors, Vestavia.

Q. All right. Can you tell the

jury, the ladies and gentlement of the jury a little bit or characterize the type or quality of competition in the Birmingham market?

A. Well, it was rough. It was -- ask me that question again.

Q. Well, you said it was rough?

A. Yes, sir.

Q. Can you tell us whether or not you know if customers would check out the prices of your automobiles?

A. Oh, yes.

MR. INGRAM: Wait a minute. If it please the Court, I'm going to object to does he know this and that unless he's able to give specific facts and circumstances.

THE COURT: Well, if it was based on hearsay, it would not be admissible.

Q. No, sir. Mr. Payne, I'm not asking you based on hearsay. I want to

know in the industry your knowledge of the industry. Do you know whether or not your customers checked the prices of your cars and checked prices of your competitors' cars?

[TR. 46]

A. Yes, sir.

Q. Did that happen frequently?

A. Yes, sir, because every deal, every retail deal that you make is an individual deal and the customers, the people that shop us, that shop with us, shop with the other dealers and there's many things that contributed to it. As these dealers opened up, they opened up with new modern facilities, they put Grand Opening sales on, and people that buy automobiles, even though they pre-sold through news media, if they make up their mind they're going to buy a Chrysler car, they're going to shop the

other dealers.

Q. Well, do you know of -- let me ask you one question. You mentioned something about modern facilities. How old was your building?

A. I think --

Q. How long had you been in the location that you were in during 1970 through '74?

A. We moved in in 1955.

Q. Where was that?

A. At 231 South 21st Street.

Q. All right. And during that time period 1970 through 1974 can you tell the ladies and gentlemen on the jury whether or not on any occasions of your

[TR. 47]

own personal knowledge you knew the customers would shop the prices of the different dealers that you just mentioned?

A. Oh, yes, yes, sir, because they would tell you when you were trying to trade with them.

Q. All right. Have you ever talked to --

MR. INGRAM: If it please the Court, hold it. I object to any testimony about shopping prices. That's exactly what I was getting at. He said people would tell them. That's a very vague --

THE COURT: Well, that would be inadmissible as hearsay. I sustain that objection.

Q. All right. Mr. Payne, can you tell the Court where in your opinion most of your customers came from that purchased cars from your dealership, Chrysler Plymouth, new automobiles?

A. You mean the section of town?

Q. Yes, sir.

A. I would believe that most of our customers came from the eastern section and the southern section because that's the heavier populated section.

Q. And was there or were there repeaters, or people that came back to you yearly and bought new cars from you?

A. Over a period of years, yes. We had a lot of

[TR. 48]

repeat customers.

Q. And during -- let me rephrase that. During 1970 to 1974, do you know of people that came to you, would check out your prices on new Chryslers and Plymouths and then ended up buying another car at one of the other dealers?

A. Yes, sir.

Q. You know that how, Mr. Payne?

A. From -- in dealing with the people.

Q. Did they come back for service at

your automobile facility?

A. Many of them did. Some of them did not, but some of them did.

Q. So they would buy a car at a different location and come back to you?

A. Come back to us to service the automobile, yes.

Q. Did that happen numerous times --

A. Yes, sir.

Q. -- over that four year period?

A. Yes, sir.

THE COURT: Gentlemen, I will review my ruling. I will permit testimony as to what customers told him, not for the truth of what they said, but for what they actually did tell him. You may go into that.

[TR. 49]

Q. Thank you, Judge.

Now, Mr. Payne, during this four year time period were there any incen-

tive and rebate programs that Chrysler Plymouth or Chrysler Corporation sponsored for all the dealerships in the area?

A. Yes.

Q. Can you tell the ladies and gentlemen exactly what your understanding is of those rebate programs?

A. Well, they had different kinds of programs. Some of the programs were -- you were required to buy a certain amount of automobiles to participate in the program. Some of the other programs you were on a quota basis. After you sold a certain number of automobiles, you would become eligible for the rebate. There were several of those programs and it's been several years ago, I can't recall these programs, but that was the type programs they were.

Q. Do you know who established the

quotas that you mentioned on these programs?

A. Well, the Chrysler Corporation established them, but I don't know who.

Q. Were these programs written out? Were they written in written form?

A. Yes. Yes, sir. Yes, sir.

Q. Your Honor, we would like to introduce per

[TR. 50]

our stipulation some sixteen programs that took place over this period of time.

[TR. 51]

THE COURT: They will be received in evidence as authentic with leave to substitute any omissions.

MR. REEVES: Thank you, Judge.

Q. Mr. Payne, you mentioned earlier that you had been in that location for approximately since 1955 --

A. Yes, sir.

Q. -- right before you went out of business? How old was your facility there?

A. I'm not sure, but I believe it was built in 1925 or thereabouts.

[TR. 53]

Q. Mr. Payne, what did they tell you about the ownership or renting of those buildings, the facilities for Vestavia and Roebuck?

A. Well, just in general discussion they said that they were building -- they built Roebuck first; it was under construction a long time and it was discussed from time to time and they just told me that they were building it and were going to put a dealer there.

Q. Do you know when approximately it was built?

A. Well, I don't know exactly, but

it was around '67 or '68, wasn't it?

Q. All right. Now, what about Bessemer which later moved to Vestavia, when did they move to Vestavia, do you remember?

A. Was it '70?

Q. Well, do you have a judgment?

A. It was about that time. I don't remember exactly.

Q. And was that a new or old facility?

A. It was a new facility. It was pretty much the same discussion about Vestavia that it was about Roebuck.

Q. For these ladies and gentlemen who might not be from Birmingham, could you tell them in general terms where you're located and then describe if we

[TR. 54]

can, and I will draw where you tell me to draw, describe on the board where

these other dealers were put in. If we assume that this is the Birmingham city limits --

A. Well, you're going east would be Roebuck.

Q. This would be north right here. No, that's west. I'm sorry. East would be Roebuck, right?

A. Yes, sir.

Q. All right.

A. South would be Vestavia.

Q. O.K.

A. And west would be Central Motors.

Q. All right. Now, where are you located?

A. Well, based on the chart, I would be more or less kind of in the middle of the circle.

Q. Right here?

A. Yes. I was bottled in from all sections except the north.

Q. Can everybody see that? Let me move this over a little bit.

O.K. Now, did the Chrysler representatives that you mentioned, Sandusky and other people, tell you anything about who owned the Vestavia facility south of you?

A. Said Chrysler.

[TR. 55]

Q. Did they specify who, what corporation?

A. No, just Chrysler.

Q. All right, sir. Now, in these -- let's go back to these rebate programs a minute we were talking about. Did you participate -- did your company participate in the rebate programs that Chrysler sent out?

A. Well, we certainly didn't participate in all of them. I don't remember whether we participated maybe in one or

two or not, but we didn't participate in all of them or most of them.

Q. Were you able to -- and what was the effect of these rebate programs? Just tell the ladies and gentlemen what happened.

A. On me?

Q. On your company. What did they do?

A. Well, they had a -- we were placed in a disadvantage in a trading position and it had a demoralizing effect on my sales force. We made some deals, naturally. We had to sell some automobiles. But we would possibly have to over-allow beyond what we normally would on used cars to make a deal because in some of those cases the rebates ran from, I would believe, thirty to maybe two hundred dollars, maybe more.

[TR. 56]

MR. INGRAM: Your Honor, I'm going to object to this line of testimony. He's saying they had to overallow. He's not testified as to what other prices the other dealers were selling them for. He hasn't testified on any basis that there was any overallowance based on any sort --

THE COURT: Well, that's a conclusion.

Q. All right, sir. I'll go into it. These rebate programs, can you tell the ladies and gentlemen of the jury what happened if you got or if you qualified for the rebate program? What was the effect of that? Did you get anything from Chrysler?

A. Yes. You would get a rebate on the cars that you sold to the retail customer.

Q. All right. When you say a rebate, what happened? What was the effect of that rebate on your company's cost?

A. Well, it would lower the cost of the car.

Q. The cost of the car you purchased from Chrysler?

[TR. 62]

Q. What does a customer look for -- well, let me rephrase that question. When you were selling these automobiles did you ever have occasion to determine the price that you would charge the customer based upon what you might get back from the rebate program? Would that influence the price that you charged?

A. Would that -- the customer?

Q. No. Would it influence the price that you could charge the customer?

A. Well, yes, because on those rebate programs if I was not getting the

rebate and the other dealer was getting it, it would certainly influence it because he would be actually owning a unit cheaper than I owned it.

[TR. 65]

Q. Did you ever participate in what's known as a stock rebate on old models?

A. Yes, sir.

Q. Can you tell the ladies and gentlemen how that took place, what type of program that was?

A. At the introduction of the new models the Chrysler Corporation would give us five percent rebate on all new and unused Chrysler and Plymouth cars that we had in stock as of announcement date of the new models.

Q. All right. You didn't have to reach any sort of quota for that, did you?

A. No, sir.

Q. Mr. Payne, you have described generally to the ladies and gentlemen what these programs were like, these rebate programs that we're talking about today. Can you tell the ladies and gentlemen whether or not you have a judgment or knowledge as to whether or not it hurt your business that you could not participate in all of those programs?

A. Definitely it hurt our business when we couldn't participate.

Q. How would it hurt your business? Just explain

[TR. 66]

it if you can.

A. Well, we would be unable to make sales. We were not -- we were not in a competitive situation.

Q. How did that affect the customer that might be interested in buying a Chrysler or Plymouth automobile?

A. Well, if I understand your question, the customer would buy where he could buy at the best price.

MR. INGRAM: If it please the Court, I'm going to object again to this line of questioning. He makes these conclusions without any statement of fact to back them up. I think it's irrelevant to the issues in this case and I think it's unsupported conclusion.

THE COURT: I overrule that objection.

MR. REEVES: I'm sorry, Judge, I couldn't hear.

THE COURT: I overrule the objection.

Q. (BY MR. REEVES) Thank you, Judge.

What do you mean, Mr. Payne, when you said that you couldn't participate in the plans? I want to try to explain this as much as we can.

A. Well, I'll try to explain it as best I can. When we didn't qualify for the program, we couldn't meet the quota. All of those cars were bought from

[TR. 67]

Chrysler Corporation by all dealers at the same price. Now, the dealers that could meet their quotas and did participate in the programs were at a financial advantage because they were actually buying cars cheaper from Chrysler Corporation than we were because when they sold those cars they were rebated and in some cases it was as much as two hundred dollars. Now, I know for a fact because I was sales-minded, I talked to and I had been in business a long time, when I was a much smaller dealer, I did a lot of retail selling myself, and I knew a lot of these customers and a lot of these customers would tell me I can

buy this car at this other dealer for less money than I'm buying it from you and I was in an unfair competitive position. There was nothing I could do about it. Another thing that it did, you know, we worked salesmen on commission. They would go out and lose business based on that -- for that reason, and they would become disenchanted. It was like throwing a wet blanket over them when they would lose deal after deal after deal. It's just that simple, that those rebates put me out of a competitive, or weakened my competitive position.

Q. And when did your business close, Mr. Payne?

[TR. 68]

A. May 24th, '74.

Q. And at that time what caused the closing of the business?

A. Chrysler Credit Corporation

withdrew our line of credit.

Q. All right. Why did they withdraw it, do you know?

A. Yes, we were out of trust.

Q. When you say out of trust, what does that mean for the jury?

A. Well, we had sold some automobiles, that when we were unable to pay for them, our cash flow had stopped and had gotten to the point that we couldn't pay for them.

Q. So you just couldn't -- you didn't have enough money coming in from sales is what you're saying --

A. That's correct.

Q. -- to satisfy your credit?

A. That's correct, if I may --

Q. Well, let me, if I may -- I don't want you to volunteer anything. It might be objectionable.

A. All right.

Q. So let me ask you, Mr. Payne, if you can tell the ladies and gentlemen what caused you to not be

[TR. 69]

able to pay for the cars that you owed Chrysler Credit? What was the cause of that?

A. Well, I had -- I had run out of money. I was not able to sell enough automobiles at enough gross profit to make money. It was -- that would be the primary reason.

Q. Did the rebate program have any effect on your ability to sell at a high enough margin?

A. It should because again I was at a traded disadvantage.

Q. How did they affect you is what I want you to tell the jury? How did they affect your inability to make sales?

A. Well, they could offer them to

the public cheaper than I could.

Q. Who is they you're talking about?

A. The other dealers, the dealers who were participating in the prgrams [sic].

Q. When you're talking about in this area -- let me rephrase that. Who were your competitors again?

A. Central Motors, Vestavia and Roebuck Chrysler.

Q. So when you're referring to they in those dealers, you're talking about your competitors in Birmingham?

A. Yes, sir.

[TR. 77]

Q. (BY MR. REEVES:) Mr. Payne, yesterday you had mentioned a little bit about these rebate programs, incentive programs. Can you tell the ladies and gentlemen of the jury if fleet sales -- what a fleet sale is in the business?

A. A fleet sale is a sale of an automobile to people who qualified for wholesale price, so to speak, because they used several automobiles in their business.

Q. Were those sales made by you to different people?

A. Yes.

Q. For instance, whom would your company

[TR. 78]

sell a fleet to just as an example?

A. Well, Alabama Power Company, Southern Natural Gas, people of that type.

Q. Excuse me. I'm sorry. Go ahead.

A. Sir?

Q. I didn't mean to interrupt you. Go ahead.

A. Alabama Power Company, Southern Natural Gas, people in that type of

business.

Q. And did these rebate programs cover fleet sales?

A. No, sir. I don't remember, but there might at some time have been a fleet program with a rebate attached to it, but I don't remember of any, I don't remember any.

Q. Well, normally then they would not?

A. No, sir. No, sir, would not.

[TR. 81]

Q. I said, in your opinion, how much was the good will of the J. Truett Payne Company in 1955, when you merged?

A. I would say it would be at least twenty-five thousand dollars, because that's about what we figured LaSeuer's good will was at the time we bought them out, and we had been in business approximately the same amount of time.

[TR. 84]

Mr. Payne, the rebate programs that you have mentioned, I wonder if you could tell us -- I don't know if I asked you. I may be repeating. But if you could, tell the jury the effect those rebate programs had on your competition with the other dealers you testified that you competed with.

A. My quotas were high, and we felt for that reason or for that reason that we were unable to compete with the other dealers because we had to sell more automobiles, some cases in the purchase programs we had to purchase more automobiles, and in many cases we just wasn't in position to do it, we just didn't feel it would be a good

[TR. 85]

business to do it, and in many cases we actually couldn't do it.

Q. Did that affect the price that the ultimate purchaser in the Birmingham sales area would have to pay for a Chrysler-Plymouth automobile?

MR. INGRAM: I'm going to object to that, Your Honor. It's pure speculation without any further predicate on that question.

THE COURT: I overrule that objection.

Q. You can answer it, Mr. Payne.

A. Will you ask the question again?

Q. Will the reporter read that question back?

(The last question was read by the reporter.)

A. I would say no. I can't see where it would affect the retail customer, because the rebates in most of those programs were given to the dealer. They were not passed on to the customer.

[TR. 86]

CROSS-EXAMINATION

Q. Mr. Payne, you have talked about the fact that you went out of business, I believe, in May of 1974; is that correct?

A. Yes, sir.

Q. And I believe you said you lost your line of credit?

A. Yes, sir.

Q. And that was with Chrysler Credit Corporation?

A. Yes, sir.

Q. Mr. Payne, isn't it a fact and you've also alluded to a two hundred thousand dollar judgment by Chrysler Credit Corporation against your company; isn't that right?

[TR. 87]

A. Yes, sir.

Q. Isn't it a fact, Mr. Payne, that

the reason you went out of business and what happened was that you sold about two hundred thousand dollars worth of automobiles and didn't pay Chrysler Credit for them and that's the reason you lost your line of credit?

A. At the time that I lost my line of credit it was the reason.

Q. In other words, you were selling cars in what they call out of trust; isn't that right?

A. Yes, sir.

Q. And when that occurred, Chrysler Credit came in and in effect foreclosed on your inventory; isn't that right?

A. We assigned our inventory to Chrysler Credit.

Q. And you ended up owing them something like a hundred seventy to two hundred thousand dollars, didn't you?

A. Something like that.

Q. Now, you remember when I took your deposition, Mr. Payne, and we talked about your past history as an automobile dealer in Birmingham, and I believe you told me that you were the oldest Chrysler Plymouth dealer in the state, isn't that right?

A. Yes, sir.

[TR. 88]

Q. And didn't you tell me that you sold more cars than anybody else in the state?

A. I would believe that we sold more Chrysler and Plymouth cars than anybody.

Q. Now, that being true, when is the last time you made a profit in your company, Mr. Payne?

A. We lost money for the last four or five years that we were in business. I would say that the last time that we made a profit was before Chrysler put

these additional dealers in to share this market with us.

Q. You made a profit in 1968, didn't you, Mr. Payne?

A. I think so, yes, sir.

Q. And didn't all of those dealers go into effect prior to 1968?

A. No, sir.

Q. Who didn't?

A. Vestavia was not in.

Q. Wasn't Vestavia the same as Bessemer Chrysler, and located in Bessemer prior to 1968?

A. Yes, sir.

Q. All it did was move from Bessemer to Vestavia, is that correct?

A. No, sir. Bessemer Chrysler Plymouth was a

(TR. 89]

very small dealer and had a very small facility and did a very small business.

When they moved into Vestavia, they moved into supposedly a million dollar facility --

[TR. 90]

Q. All right. Thank you, sir. Now, you said that one of the problems you had was that Bessemer moved over to Vestavia, is that correct, and caused some of your problems?

A. Yes, sir.

Q. Of course, you had no contractual right, did you, Mr. Payne, to have an exclusive franchise in that area that covered Vestavia, did you?

A. Not at this time, no, sir.

Q. And in your mind there was nothing legally impermissible about Bessemer moving to Vestavia, was it?

A. Illegal?

Q. Yes.

A. I wouldn't know, sir.

Q. Now, when they moved over there, didn't they move over there in May of 1971?

A. It was about that time. I don't remember the exact date.

Q. Now, I'll ask you, after they moved over

[TR. 91]

there, Mr. Payne, in May of 1971, whether or not you in fact sold more automobiles in 1972 than you did in 1971?

A. I don't remember whether we did or we didn't, but I don't think the amount of automobiles that we sold would have anything particularly to do with the amount of profit we made. Due to increased competition and tougher competition, we were having to sell those cars at a smaller gross. So, certainly when Vestavia, when Chrysler opened up in Vestavia, it suddenly hampered our

business.

Q. Well, I don't understand that, Mr. Payne. I want you to explain that to me. If you are selling more cars than you were the year before with them over there in Vestavia, you're not losing any volume, how is it that that is not competitive?

A. Well, in 1969, Chrysler changed the body style of the automobiles. It wasn't a good year for Chrysler -- I'll try to answer this as best I can. The number of automobiles that you sell doesn't always determine the amount of gross, of profit that you make because the more automobiles you sell, the more it costs to handle them. We were trying desperately to reach our quotas and in many cases we had to take deals that under normal circumstances we wouldn't take

[TR. 92]

due to increased competition.

Q. Mr. Payne, I mean, are you telling me and are you telling the jury that the less cars you sell, the better off you are?

A. No, sir, I'm not telling the jury that. I'm trying to say that we were forcing business and when you force business you cannot force it at a profit, a good profit or a reasonable profit.

Q. Why were you forcing business?

A. Because I was trying to reach my objectives. I was trying to sell the automobiles. I was trying to stay in business. I was losing money and I was trying to stay in business.

Q. Well, what did that have to do with the sales incentive programs, Mr. Payne, if you were just trying to meet competition because they were selling

your customers? What's that got to do with the sales incentive program?

A. Well, on those rebate programs -- I have testified before that it gave the dealers that could participate an advantage because they owned those cars at a per unit less cost than I owned them and it put me at a disadvantage.

Q. Mr. Payne, now, I want to ask you this. I want to get to that subject matter. You've testified

[TR. 93]

that it put you in a competitive disadvantage, that you lost sales and that they were underselling you and all this sort of thing. Let me ask you this. How many sales did you lose? Do you have any record of the number of sales that you lost to another dealer because of the bonus paid those dealers under these incentive sales programs?

A. I wouldn't have any record of that, no, sir.

Q. You don't have any idea, do you?

A. I think if you would look at the -- when we started to losing money, we had been here for twenty-five years and I think that the fact that when they moved in these dealers on top of us, I think that is proof enough that that was the reason we were losing money.

Q. I'm not talking about the dealers, Mr. Payne, I'm talking about the sales incentive programs. I want to know how you know and what you have to prove that you lost sales to another Chrysler Plymouth dealer because of the bonuses paid under sales incentive programs?

A. I don't have anything specifically. That's been several years ago. I can't remember. I know this, that I was there every day in the operation of my business

and I knew daily that we were losing

[TR. 94]

business on account of that. I don't think any dealer could answer that question.

Q. That's right, I agree with you, Mr. Payne, because the only way you could answer that, isn't it a fact, is if you were to compare a sale that another dealer made and see what that individual bought it for and see what you would have sold the same car for; isn't that right?

A. I didn't understand the question.

Q. Well, the only way you'd ever be able to know about that sort of thing is to go and talk to your competing dealers and see if they took a customer and used the bonus rebate, the bonus incentive program to reduce the price of the car to the customer; isn't that right?

A. They had the rebate program, we

did not. So, I maintain that it put us at a disadvantage. I'm trying to answer these things as best I can and I won't change my mind about that.

Q. Well, let me ask you this, Mr. Payne, and I'll go back to my original question. Do you have records, do you have any concrete proof that you lost a certain sale or a certain number of sales that you otherwise would have made except for the bonus program?

[TR. 95]

A. I think it would reflect in our financial statement. That would be the only proof that I'd have.

Q. But you don't know of any specific sales? You couldn't tell me today?

A. At the moment I don't know, but I knew when it was happening when we were operating the business. I knew then because I talked to the customers, many

of them myself. My salesmen complained of losing business for that reason.

Q. Now, let me ask you this, Mr. Payne. Another thing you responded to is that your competitors, the other Chrysler Plymouth dealers were using this bonus money to reduce the cost of the automobiles, is that what you were saying, to the consumer?

A. I was saying that the rebate program reduced the cost of the automobile to the dealer. I would not know what happened after then. But my statement was that it reduced the cost per unit to the dealer that qualified for the bonus.

Q. Well, I believe it was your testimony also that it wouldn't affect the retail value of the automobile, the last thing you testified to, that it would not affect the retail value of the automobile, the resell cost of the automobile to the

consumer?

[TR. 96]

A. To the consumer? I would have no way of knowing that because I wouldn't know whether they passed that on to the consumer or whether they didn't.

Q. Well, you testified -- the last question Mr. Reeves asked you is whether or not it would have any effect on the retail sale of the automobile and you said no.

A. I wouldn't think so. I still say it would not.

Q. So, what you're saying is to the consumer or to the individual on the street the bonus program is not going to have any effect in enticing him to buy from one dealer or another?

A. I didn't say that. It might have an effect in enticing him to buy the automobile, but I don't think that

through a rebate program that anybody particularly benefitted except the dealers that were qualified for the program and the manufacturere [sic] because it helped the manufacturer move automobiles by giving rebates to those dealers who did qualify.

Q. Well, Mr. Payne, I need for you to explain to me that if the purchaser of the automobile, the retail purchaser doesn't get any benefit out of it, how is it going to affect competition? How is it

[TR. 97]

going to affect whether he buys a car from you or from somebody who qualified under one of the bonus programs if the retail price is not affected by it?

A. I don't think that the retail customer would actually know. He would know if he was getting a buy in a car at

a lower price, and if he was buying a car at a lower price, he would naturally buy it from the dealer that gave him the lowest price. That's where I say that the rebate program was unfair because it was on a unit basis.

Q. But you told me that the retail bonus was not used to reduce the price to the consumer. Now, how is that going to influence the consumer whether he buys from you or somebody else?

A. I can't answer that question, Mr. Ingram. Various advertising gimmicks are used daily to attract the customer. Now, how would the customer know whether he would profit by that or not? He thinks so because he goes in, I guess, to look at automobiles. There's programs now running where you can buy an automobile for one dollar above invoice. Now, how does the customer, you know, the

retail buyer know that he can buy that car for one dollar above invoice?

Q. Now, Mr. Payne, isn't it a fact that the

[TR. 98]

thing that really ended your business was the fact that you had a very poor used car operation?

A. No, sir.

Q. It is not?

A. No, sir.

Q. You didn't testify in that deposition that I took that the fact that your wholesale or that your line of credit on used cars was reduced is what put you out of business?

A. I tesified that my, that they reduced my line of credit on used cars and we were forced to wholesale the used cars that we could wholesale and try to retail the other automobiles. Now, that

was brought about by Chrysler Credit reducing our line of credit on used cars.

Q. Mr. Payne, on page 77 of your deposition, I want to ask you whether or not Mr. Hairston, the lawyer for Chrysler Credit Corporation, asked you these questions and whether or not you made these responses. "And in 1974, the year you closed, you owed them six hundred forty thousand dollars, in 1973 you owed them seven hundred eighty-nine thousand dollars. Is that what you mean by your credit, that your credit was curtailed? Answer: Mr. Hairston, I have never complained about my credit being curtailed

[TR. 99]

on new cars. The thing that put me out of business was when they curtailed my used car operation, and they never did --

I always had enough new cars to sell. That's not what I contend at all." Didn't you say that, Mr. Payne?

A. Yes, sir.

Q. And again on page 78 of your deposition following that dialogue we just had beginning at the bottom of 77. "Question: Well, there wasn't any real dramatic change in the amount of credit that you were actually receiving from Chrysler Credit during the time you were dealing with them, was it? Answer: On new cars? Question: On new. Answer: I don't know. Right there at the last they might have cut it some, but that is not my argument at all. It is the used cars. When they cut my used car credit, that's what murdered me." Did you say that?

A. I don't know whether I said those exact words or not, but I assume that I

did.

Q. And again on page 79 Mr. Hairston asked you this. "So, you were still maintaining the same sales level but the cost of doing business was increasing and cutting down on your profit picture; is that right? Answer: Mr. Hairston, this has come up twenty times before. The thing that murdered me was that I

[TR. 100]

would go and sell a new car and trade in a used car and because I didn't have the line of credit to put it on my used car lot, I had to take it would and wholesale it. That is what murdered me." Didn't you say that, Mr. Payne?

A. I assume that I did, yes, sir.

Q. Mr. Payne, in fact, didn't you attribute the fact that your used car operation as affected by your line of credit is what put you out of business?

A. No, sir.

Q. In other words, you didn't mean what you said in that deposition?

A. That was one of the things that caused it. The thing that put me out of business, and obvious from my financial statements, was the fact that when Chrysler Corporation built these new buildings and put in these dealers in strategic points in the heavily populated points. That's what primarily put me out of business. It's that simple.

Q. And it wasn't the sales incentive program?

A. The sales incentive program was one of the things that was involved. There was many things involved, but the rebate programs were certainly a part of it.

Q. Now, on these sales incentive programs, Mr.

[TR. 101]

Payne, are you familiar with them generally, those that you introduced into evidence?

A. Most of those programs are different. I'm familiar with them to a degree, yes, sir.

Q. And basically would it be fair to say that there are two types of programs? One had a wholesale purchase objective whereby you had to purchase a number of cars to first qualify and then you were paid on cars sold after you qualified. That's one type, is it not?

A. Yes, sir.

Q. And the other type, as I understand it, was basically a retail sales program without any wholesale purchase objective attached whereby you had some base line objective to obtain and then if you met that objective or went above

it, you received a bonus; is that correct?

A. Yes, sir.

Q. Now, as I understand it, and you tell me if I'm wrong, in order to qualify for these wholesale, what I call wholesale, retail programs where you had a wholesale purchase objective, basically what you were required to do was to purchase a given number of cars; is that correct?

A. Yes, sir.

[TR. 102]

Q. Now, isn't it a fact that in many of those programs, Mr. Payne, you did not qualify?

A. That's correct.

Q. In other words, you didn't buy the automobiles, purchase automobiles?

A. That's correct. In many of those programs we could not buy it because our

quota, our percentage that they expected us to buy was unfair, it was unreasonably high. I maintain that is the reason we could not participate in those rebate programs.

Q. You say it's unfair and unreasonably high. Do you know how they were calculated?

A. No, sir, but we were -- I know this, that we were charged with forty percent of the sales expectancy in this area and some of the dealers were down as low as twenty in those programs, and that certainly had something to do with the program.

Q. Now, the dealers you talked about that had a smaller fair share, they were younger dealers and they had been in business less time, had they not?

A. Yes, they had been in business less time.

Q. And they were located in different parts of the city. One was in the east, one was in Bessemer, until it moved to Vestavia, and one was further west toward Bessemer than you; isn't that correct?

A. Yes, sir.

[TR. 103]

Q. So y'all were located in different areas?

A. We were -- the sales areas, I assume, for all the Chrysler dealers were the same.

Q. And you were in the central downtown area, that's correct, isn't it?

A. Yes, sir.

Q. All right. And you were surrounded, there were a lot of dealers in the downtown area?

A. Yes, sir.

Q. And good, strong dealers, isn't that correct?

A. Yes, sir.

Q. Like Drennen Motor Company and Doug Willey Pontiac?

A. Yes, sir.

Q. And a number of them like that who are really strong dealers?

A. (Nodding head affirmatively.)

Q. Now I want to ask you something about your fleet sales, Mr. Payne. I believe you testified that when you sell a fleet, you get a lesser gross per unit sold, is that correct?

A. Yes, sir.

Q. All right. And I believe you also testified that as a general proposition, these fleet sales did not qualify under these sales incentive

[TR. 104]

programs?

A. Yes, sir.

Q. Mr. Payne, do you know what

percentage of your business was fleet?

A. Offhand, no, sir.

Q. What if I told you it was around twenty-four or twenty-five percent of your volume, volume of new cars sold?

A. Well, that's conceivable.

Q. And if that were true, and they didn't count toward retail sales for the sales incentive programs, wouldn't that have some affect on your earnings by the sales incentive programs?

A. I didn't understand the question.

Q. Well, if fleet sales do not qualify under these various sales incentive programs as retail sales for the purpose of payment, and your business constituted twenty-five percent fleet sales, wouldn't that have some affect on your earnings under these sales incentive programs?

A. I wouldn't think so.

Q. You say you would?

A. I would not.

Q. Why not?

A. Because the rebate programs were based

[TR. 105]

on a per unit basis, and it didn't apply to fleet.

Q. That's what I'm saying. If you sold a fleet car, and you couldn't get a bonus payment on that fleet car, that's a car you sold, you couldn't get a bonus on, isn't that right?

A. Yes, sir.

Q. And if you had a high percentage of your retail sales that were in fleet, that would have an affect on your earnings under our retail bonus program, wouldn't it?

A. I can't answer that question. I don't know.

Q. On these bonus programs, Mr. Payne, and of the number that have been introduced here into evidence, do you know on the total how you compared with the other four dealers in terms of earnings?

A. No, sir.

Q. Would it surprise you to know that you were second?

A. I didn't know that I was second, but if I had been able to compete in those bonus programs on those rebates, maybe I would have still been in business, if I was second.

Q. And, Mr. Payne, let me ask you this, on those bonus programs it's your understanding, is

[TR. 106]

it not, that anyone who qualifies at a given level receives the same amount of money per car as anyone else who

qualifies at the same level?

A. Yes, sir.

Q. No difference there?

A. No, sir.

Q. The difference is where you don't qualify at all or where you qualified at a lower level, is that correct?

A. Yes, sir.

Q. Now, on the wholesale purchase program where you're required to buy a number of cars before you could sell, you said you couldn't buy that number, you weren't able to buy them. I assume that's what you said, is that correct?

A. I don't remember the specific programs, but they could have been a number of things. We might have been up to our limit on our line of credit. We might have been overstocked with cars at the time. We didn't feel it was good business to enter into them and

for that reason we didn't. We felt that we could not afford to for one reason or the other. There was several things that would be involved there, and, you know, after all it's been several years ago, and I just can't remember

[TR. 107]

each specific program.

Q. Yes, sir, I can understand that, and I'm not asking you to do that. But basically it was an election on your part not to purchase, isn't that correct?

A. Yes, sir.

Q. Now, you say your line of credit -- I believe you testified in your deposition that I read that you always had an adequate line of credit for buying new cars, did you not?

A. Not always, but most of the time we did.

Q. And you said that your decision to

enter or not to enter one of these programs might be affected by what your inventory was, is that correct?

A. Yes, sir.

Q. And are you aware that in calculating the wholesale purchase objectives, the amount of the dealer's inventory is drawn out of the objective, what he already has on hand or in transit? Were you aware of that?

A. I didn't understand your question, Mr. Ingram.

Q. Well, you said that one of the reasons that you gave for not entering one of these wholesale purchase objective programs is that you may

[TR. 108]

have had a large inventory at the time?

A. Correct.

Q. My question is, do you know that in calculating your wholesale purchase

objective that Chrysler pulled out from that your present inventory to reduce what ordinarily would be your objective by the amount you already had in inventory? Did you know that?

A. I can't answer that question. I don't know whether -- I assume that they did, but I just don't know.

Q. Yes, sir. Now, Mr. Payne, one of your programs would come out, and isn't it factually true that one of the district managers would usually come by and explain the program to you?

A. Yes, sir.

Q. And tell you how it operated?

A. Yes, sir.

Q. I mean you had no problem understanding the programs?

A. No, sir.

Q. Now, Mr. Payne, let me ask you about -- I'll turn to another line here

that we've been discussing a little bit, and when you were talking about your value of your business and your good will,

[TR. 109]

and that sort of thing, I believe you said you purchased LaSeuer Motor Company in 1955, is that correct?

A. Yes, sir.

Q. You paid what, forty-five thousand dollars for it?

A. Yes, sir.

Q. And you are saying half of that amount to good will, is that correct?

A. Approximately.

Q. Well, what do you base that on? I mean, how do you make that division, half good will, half assets?

A. I didn't make that division. What we bought from LaSeuer Motor Company was his office equipment and his shop equipment and parts, and I figured about

half -- when I agreed to pay forty-five thousand dollars for the business, I figured that he did not have that many parts, but it was worth it for me to get the business and the rest I considered good will.

Q. Well, are you saying that what wasn't the value of the parts was simply a sum you paid him just simply to buy the business from him or was it good will or do you know or can you divide

[TR. 110]

them?

A. I'm trying to answer your question. I just didn't understand that question, Mr. Ingram.

Q. Well, what I'm asking you is, did you simply pay him forty-five thousand dollars to get and buy the business or were you really paying him for good will? I mean, was it set out that way in your

agreement?

A. No, sir. Mr. LaSeuer wanted forty-five thousand dollars for the business, and we felt that it was -- that we should buy it, and knowing or feeling that there wasn't forty-five thousand dollars worth of actual assets that we were getting, we got none of his accounts, none of his used cars or anything like that.

Q. You say feeling. Did you take an inventory? Did you do anything to determine what the actual value of the assets were?

A. Mr. Rawls, who was our business manager, handled that. It was his opinion that there wasn't enough there to compensate for the forty-five thousand dollars, but we felt that LaSeuer had a good reputation, he had been in business about the same length of time that we

had been, and we were willing to go on and buy it.

[TR. 111]

Q. And you did not continue to use LaSeuer's name in your business?

A. No, sir.

Q. All right. What did you do, just take over? Did he have a building or anything?

A. Yes, sir.

Q. He had some real property, and he had parts and equipment?

A. Yes, sir.

Q. Repair equipment and that sort of thing?

A. Yes, sir, office equipment and some shop equipment, but LaSeuer had taken it -- there had been a Chrysler dealer there before, and a lot of that equipment was old and unusable, but that's actually what happened.

Q. Now, Mr. Payne, you also testified that at that time that the value of your business in 1955 was, I believe you said, seventy-five thousand dollars, is that correct?

A. I can't testify to the exact figure, but I would say that that is reasonably correct, yes.

Q. Isnt't [sic] that what you said?

A. Yes, sir.

Q. Now, did you say that in addition to that or as a part of that, there was twenty-five thousand

[TR. 112]

dollars in good will?

A. I would say as a part of it.

Q. As a part of the seventy-five thousand dollars?

A. I can't answer that question. What I said was that I felt that we had been in business for ten years, and that

suddenly our good will -- we certainly had, in my opinion, twenty-five thousand dollars worth of good will, having been in business ten years in the same location.

Q. Did you sit down -- have you calculated the value of your business at that time? Do you have any figures or calculations that you arrived at that figure from at that time?

A. At the time that we made -- that we merged and bought out LaSeuer, was that your question?

Q. Yes, sir. Well, or at present? Have you made any calculations to derive that seventy-five thousand dollar figure?

A. I still don't understand your question, Mr. Ingram.

Q. Mr. Payne, let me simplify it for you.

A. Please do.

Q. You told me your business is worth seventy-five thousand dollars, and I want to know how you

[TR. 113]

derived that figure of seventy-five thousand dollars. I want to see where you sat down and added up things and came up with the severnty-five [sic] thousand dollars.

A. At what time, Mr. Ingram? Which business are you talking about, at the time we merged with LaSeuer or at the time I went out of business?

Q. I'm talking about at the time you merged with LaSeuer.

A. Well, certainly we had records to substantiate it at the time. Now, that's been twenty years ago.

Q. Yes, sir, that's what concerns me. You are now saying twenty years later it was worth seventy-five thousand

dollars, but you don't tell me the basis of the seventy-five thousand dollars. That's what I want to know. Where are your calculations to show that it was the value of seventy-five thousand dollars or is that just some figure you picked up out of the air?

A. Mr. Ingram, it would be absolutely impossible for me to go back twenty years and tell you exactly what I remember at the time, that when we made the transfer we borrowed the forty-five thousand dollars from CIT Corporation to buy out LaSeuer, and we had to furnish them with a reasonable financial

[TR. 114]

statement to be able to borrow the money.

Q. Mr. Payne, I'm talking about the seventy-five thousand dollars that you said your business was worth. Now, I don't know whether you're talking about

your business combined with LaSeuer or your business before you bought LaSeuer.

A. I'm talking about our business before we bought LaSeuer out, because CIT Corporation loaned -- made us a capital loan to buy out LaSeuer Motor Company, and it was a forty-five thousand dollar loan, and it's reasonable to believe, and I would believe that the business certainly was worth that or CIT wouldn't have loaned us the money.

Q. Well, you testified it was worth seventy-five thousand dollars?

A. I still testify that I think it was worth seventy-five thousand at least.

Q. But you can't tell me how you got the seventy-five thousand dollars, I guess is what you're saying?

A. Mr. Ingram, again this was twenty years ago. I would have no way of -- my memory is not that good. I can't

remember exactly what the assets were at that time. I would believe that it could have been worth even more money than that, but I

[TR. 115]

would believe or would have to believe that it was worth at least that much or CIT would not have made us a capital loan to buy out LaSeuer.

Q. But you don't have any present books and records to reflect that?

A. No, sir, I do not. No, sir, I do not.

Q. And it's just your best opinion, I suppose?

A. Yes, sir.

Q. All right. I just want to ask you a question. I may not have understood. But when was your present facility built?

A. I'm not sure, but I believe it was 1925.

Q. '25?

A. Or it could have been 1935. I'm not sure. I wouldn't know.

Q. Now, when you went out of business in 1974, Mr. Payne, I believe you valued the present value of your property at fifty to seventy thousand dollars or the value of the business at that time?

A. Yes, sir.

Q. Now, I'm going to go through the same thing we did on the seventy-five thousand dollars. I want you to tell me how you got fifty to seventy thousand dollars?

A. Well, at the time we went out of business

[TR. 116]

after we had turned over our inventory to Chrysler Credit, we had some office equipment, some other equipment and I would -- we were there -- we had been

in business for thirty years. It was actual -- actually it was a going concern. We had not -- the company -- the corporation was still in existence, and I feel that the good will alone would have been worth seventy-five -- fifty to seventy-five thousand dollars.

Q. Well, now, you say the good will alone. Let me ask you if you took this into consideration in figuring that, Mr. Payne: Now, here you had a business that hadn't made a profit since 1969; here you had a business that didn't even own the building they were in, and the building was built in 1925 or 1935, and leased, and isn't it a fact that your Chrysler franchise agreement says you can't sell your franchise without the written consent of Chrysler?

A. That's correct.

Q. Did you take all of that into

consideration in arriving at that figure, Mr. Payne?

A. Yes, sir, I took it all into consideration, because a lot of people would like to have a downtown or Chrysler dealership, and I would believe

[TR. 117]

that that would be more than a fair price as far as good will is concerned for a company that had been in business thirty years.

Q. And hasn't made a profit in the last five or six years?

A. That's correct, sir. We made profit from time to time. Other businesses, other automobile dealerships right in the City of Birmingham have gone for periods of time without making a profit. Maybe if we had been able to participate in those rebate programs, maybe we would have had a better flow of

cash and could have made a profit instead of having a long losing streak.

Q. And maybe if you had had a better used car business, you would have stayed in business, isn't that right?

A. And I'm not trying to get into a discussion with you, Mr. Ingram. Basically I believe and I cannot change my mind that the fact that Chrysler Corporation came in and put dealers all over me in new buildings, that participated in the same occupation that I was participating in, that I can't help but believe that that is what put me out of business. I will die believing it, because that is the primary reason. I did all right for twenty-five years without

[TR. 118]

that competition.

[TR. 123]

REDIRECT EXAMINATION

[TR. 124]

Q. Okay. You also mentioned on your examination with Mr. Ingram that there was tough competition in this area, and that you were having to sell at a smaller gross profit in order to compete?

A. Tjat's [sic] correct.

Q. Could you in many cases meet the low price that the other dealers, Chrysler-Plymouth dealers were offering?

A. No, sir.

[TR. 125]

Q. Was this during the rebate programs that we're talking about?

A. Yes, sir.

Q. Did those rebate programs -- I think you have said -- let me rephrase it.

I think you have said those

rebate programs affected the cost per unit?

A. They did.

Q. Now, if you had a higher cost per unit because you didn't participate in the rebate program, and another dealer here did participate in it, and had a lower price per unit, then would that affect the price at which you could offer the car for sale to the public?

A. Yes, sir.

Q. So it would affect the price of the car to the public, is that correct?

A. It could, yes, sir.

Q. Okay. Can you lean back a little, Mr. Payne. There you go. You were breathing in the microphone. That's all right.

Mr. Payne, do you know how many cars you sold, your corporation sold in 1970? Would that be or would that be

reflected on some document somewhere?

[TR. 126]

A. It would be reflected on a financial statement.

Q. You're talking about the dealer financial statement?

A. Yes, sir.

Q. Do you know whether or not or did you ever discuss with Chrysler Corporation whether or not in 1970 your sales for the Birmingham area amounted to forty percent of the business in this area, in other words, what they said was your fair share?

A. Well, now, that was my fair share, according to Chrysler Corporation. We discussed it from time to time, yes, sir.

Q. That's because you never did -- you could not ever get to that fair share?

A. That's correct.

Q. During these rebate programs you told Mr. Ingram that you didn't have any specific data on each sale that your company lost. Can you tell us how you know that your company lost sales because of the rebate program?

A. Well, your customers would come into your showroom, and you would lose the business there. You knew they bought Chrysler automobiles, because it would be shown in your registration sheet, and

[TR. 127]

they would tell you, "I could buy this car over here for less than I can buy it from you, and I'm going to buy it over there," and in many cases some of our customers that we had had for years bought and then came back to us to service the automobiles for them, even for the free service.

[TR. 134]

GEORGE IGNATIN

[TR. 137]

Q. Can you tell the ladies and gentlemen of the jury just briefly what types of programs and what are the effects and what happens when a dealer

[TR. 138]

participates in those programs in Birmingham?

A. It's my understanding that this is a fairly normal procedure in the automobile industry, at least it is for Chrysler. They have a regular means of rebating monies to the dealership. These are bonus programs, quota programs set up in which each of the dealers is given some kind of a planning potential or a fair share and if they meet or exceed that, depending on which program, they then get certain monies back from

Chrysler. Now, the effect of this is to reduce the cost of the car to the dealers per unit. The money is paid by Chrysler in almost all of these programs on the number of cars that these dealers sell to final consumers. The dealers pay Chrysler an equal amount for the cars and then the effect of this, or of all these programs, then, is to reduce the cost to the dealer of the cars that the dealer buys from Chrysler.

Q. Can you tell the ladies and gentlemen if there is a purchase objective in most of these programs, and tell them what that means.

A. In a couple of programs, not most of them as I recall, there was what we call a wholesale purchase objective as well as a retail objective. Now, the purchase objective refers to the dealer's

[TR. 139]

purchases from Chrysler. The retail objective refers to the number of cars the dealer sells to ultimate consumers. Now, as I say, in a couple of these programs, not a majority of them, the dealers have to purchase a certain number of cars from Chrysler before they qualify for the rebates which are based on the sales made to the ultimate consumers.

Q. So, the monies paid are based on the sales for the most part; is that correct?

A. Yes. The monies in all cases except, I think, two where there was a floor plan involved, and it's not clear whether that's a purchase or retail, but in all the cases other than that, the actual rebate or discount on cost was paid on retail sales by the

dealership to consumers.

[TR. 191]

Q. Do you have a total figure, Dr. Ignatin, for the amounts of rebates that you have figured on your chart in the last column, the charts, excuse me, that we were going over a little while ago that shows the total difference over the four year span for J. Truett Payne Company?

A. Yes. The total difference between what -- you mean between what J. Truett Payne would have received if they had not been discriminated against?

Q. Right.

A. My figure is eighty-one thousand two hundred forty-eight dollars and ninety-four cents.

[TR. 202]

Q. Now, based on your knowledge and the fact that you have been teaching and

dealing in competition and the effects that price differences have on competition in a given market, can you tell the ladies and gentlemen of the jury your opinion of the effect that these programs that you've charted for us have on competition in the Birmingham market?

MR. FORMAN: Your Honor, I would object to that on the grounds he shows no knowledge of the automobile market, that he's made any studies in the automobile market.

THE COURT: I overrule. His opinion, the credibility of it is for the jury.

A. This is, of course, in the form of some degree of speculation. But we do go back to economic theory and see what we would predict would happen from this kind of a situation. The cost difference to Payne means that they're paying Chrysler

more per unit than the other dealers. Now, they have to compete with these other dealers and they have to compete although they're paying higher costs to Chrysler for the cars. Now, this has a two-pronged

[TR. 203]

effect on competition which we would look for. First, it makes Payne less able to compete in the selling of cars. It's normal business procedure and it's well known that the salesman discounts off of list price, and the ability of the sales[man] to discount off of list price clearly will be related to the cost of the dealership to the automobile company. So, if you have two companies competing with each other and one has a higher cost than the other, the ability of the one company to compete is less than the other. Now, not only does

this impair Payne's ability to compete with the other company, it also hurts competition in the sense that the company enjoying the price discrimination is insulated from competitive forces and does not itself have to compete vigorously, which is to say, they're isolated from the competition that would have resulted from Payne if Payne had gotten the equally low price or the equally high rebate. So, Roebuck or Central, which in most of these cases were the ones who received the benefits of these price discriminations, were insulated from having to compete as vigorously with Payne as they otherwise would have had to.

Q. What effect does that have on the price of a given product to the ultimate consumer?

[TR. 204]

A. Well, the predicted effect is that

these other companies not having to compete as hard and Payne not being able to compete because of this price discrimination, the predicted effect is that the price that the ultimate consumer would pay for the goods would be slightly higher.

Q. Have I asked you, Dr. Ignatin, to determine from the dealer financial statements of the J. Truett Payne Company as best you could the different cash flows and revenues over a given period of time?

A. Yes, I did look at that.

Q. Have you examined the volume of sales over a period of time from 1967 through 1974 for J. Truett Payne Company?

A. Yes, I have.

Q. Where did you get all this information?

A. From the financial statements.

Q. Dealer financial statements?

A. Dealer financial statements, yes.

Q. And have you made an attempt -- let me rephrase that question. In the studies and courses that you are teaching at the University of Alabama and elsewhere, does the study of economics get involved with or do you determine the going value or the market value of a going concern in a market,

[TR. 205]

business of selling products in a given market?

A. Yes, this is a standard question in many economics courses and finance courses, the valuation of a business, yes.

Q. And have you made an attempt to make an evaluation or give your opinion as to the market value of J. Truett Payne Company as of May 28, 1974, when it

went out of business?

A. Yes, I have made two attempts. I have used two methods.

Q. When you say two attempts, you mean you took two different approaches?

A. Yes, two different methods.

Q. Could you tell the ladies and gentlemen of the jury your opinion as to the value of the going concern of J. Truett Payne Company on May 28, 1974?

A. O.K.

MR. FORMAN: Your Honor, we'd object to that until he lays an adequate predicate of what he did.

THE COURT: I overrule the objection.

Q. You may answer.

A. First let me say the problem involved is to figure out what J. Truett Payne would have been worth in May of 1974 as a going concern if they had not

suffered the price discrimination which I have

[TR. 206]

estimated cost them approximately eighty-one thousand dollars over the previous four years. Now, J. Truett Payne lost money in each of those four years and they would have lost eighty-one thousand dollars less than that if they hadn't been discriminated against. So, the question, then, for me to figure out is how much was that business worth as of May, 1974, if they had not been discriminated against in these programs, which is to say, had eighty-one thousand dollars more than they actually did. Now, I used two methods. The one method is a very simple method which I used just to get a ballpark estimate to see if I'm going to come to somewhere in the right place to it. For that I went back to

what the business was worth back in 1955 when it opened in the location it was in in 1974. From conversations with Mr. Payne, he told me that he bought out Leseur in 1955 for forty-five thousand dollars and he estimated that of that purchase price, about twenty-two thousand five hundred dollars was goodwill. Now, goodwill refers to the value of the business beyond its physical assets. This refers to the value of customers and the good name of the business. Well, at the time that J. Truett Payne bought Leseur in 1955, he merged his own business, which it was itself

[TR. 207]

a going concern into the business, or he actually did it the other way, he merged Leseur into his business at a new location, and from conversations with Mr. Payne he said that his business was worth

about a hundred thousand dollars at the time. He was not clear as to what the goodwill of his business was worth.

Q. Let me give you an assumption or a hypothetical to take into account in your answer, Doctor, that assuming that J. Truett Payne has stated or testified that his goodwill at that time was approximately twenty-five thousand dollars. Could you make an opinion, give your opinion as to the goodwill of the company as of May 28, '74?

A. He declared in court that it was twenty-five thousand dollars?

Q. Yes. I want you to assume that.

A. Now, the estimates I had made the other day which I gave to the other attorneys was that I assumed about a thirty thousand dollar goodwill involved for Mr. Payne's business based on what he had paid for Leseur's goodwill and if

his evaluation of his company was a hundred thousand dollars, that it would be worth somewhere around thirty thousand dollars. I started on the assumption that his

[TR. 208]

goodwill in 1955 was fifty-two thousand five hundred dollars. Now, you're saying that it would be, that his part was only twenty-five thousand. That would reduce it to forty-seven thousand five hundred dollars, the goodwill in 1955.

Q. Right. Do you need a calculator, Doctor?

A. I think I might be able to do this by hand.

Q. I apologize.

A. It looks like about a twelve thousand dollar difference.

Q. What is your opinion as to the market value of the going concern as of

May 28, '74?

A. Now, using this first method, I used a figure of about a four percent growth in the value of that firm per year for each of those twenty years. Now, the method I used was to use a combination of interest rates and rates of inflation. Economists use both methods. It usually depends on which one is higher and what they're interest in seeing. I don't feel particularly strong about either method. They're both good methods. They're both accepted methods in the profession. I'm not prepared to argue that one method is superior to the other. I prefer using both. So, I used four percent, which is just a rough average of the inflationary and the prime interest

[TR. 209]

rate over that twenty year period.

Interest rates tended to be a little higher than that and inflation tended to be a little lower than that four percent. My figures indicated that with my original estimate of fifty-two thousand five hundred as the going concern value in 1955, that the firm in 1974 would be worth about a hundred fifteen thousand dollars. Given what you just said that Mr. Payne testified, if the firm started out at forty-seven thousand five hundred dollars, that would mean and this is a guess, I think I need a calculator, you can use one if you want, but it's going to be slightly over a hundred thousand dollars. I don't know if you need precision on this anyway.

Q. Is that a common and standard method in your profession as to make adjustment of a value of the goodwill of a company over a period of years?

A. Yes. It's not the preferred method, but it is one other method if you have no other way and it is good to give you some idea of what kind of estimate you're coming up with to check your figures to see if things are happening. Obviously the value of Payne's business could have grown more or less than this four percent average per year over the twenty years. A better method is the second method which

[TR. 210]

I used, and this was an attempt to estimate how much money J. Truett Payne would have earned or lost in each of the four years after it went out of business.

Q. The second method is also a standard method in your profession in determining goodwill and value of a going concern?

A. Yes.

Q. O.K.

A. Now, in 1974, Payne lost twenty-two thousand three hundred thirty-five dollars in the four months it was in business. However, I also determined that in 1974 they lost sixteen thousand and thirty dollars due to price discrimination in these rebate and bonus programs, which means that in 1974 Payne would have lost a little over six thousand dollars if it had not suffered price discrimination in these programs. Now, they were in business for four months. I took that figure of about sixty-three hundred and five dollars and I multiplied that by three, and that came to nineteen thousand dollars and I raised it to twenty because it's easier to work with and I said let's assume that Payne would have lost twenty thousand dollars during 1974 if they had been in

business the entire year and had not been subject to these discriminatory rebates. All right. 1974 was

[TR. 211]

a very bad year in the American automobile industry. This was the year following the Arab oil boycott, the embargo on oil sales, the extremely rapid increase in the price of all forms of energy and the overall inflation in the country. In addition, gross national products, the total dollar value of goods and services sold in this country in real terms fell in 1974. So, it was a very bad year for the whole economy and it was particularly bad for the automobile industry. Now, in 1975, what would Payne have done? Well, I related 1975 to '74. '75 was a bad year for the American automobile industry, but not as bad as 1974, although Chrysler had their worst year in their history in

1975. This was a disaster year for Chrysler, in large part, however, due to overseas operations. Now, what I figured was that given the fact that '74 was such a bad year with inflation, with the rising price of gas, with Chrysler being caught perhaps with the wrong models or whatever, but in real bad shape, that if Payne would have lost twenty thousand dollars in 1974, he probably would have lost around ten thousand dollars in 1975. Now, that ten thousand dollars loss in 1975 needs to be refigured back as to its discounted value in 1974.

[TR. 212]

Q. Is that because -- can you tell the ladies and gentlemen why?

A. As I understand it, what I'm trying to do here is figure out how much the firm was worth in 1974 and so

losses suffered in 1975 need to be discounted either by the rate of inflation or the interest rate to figure out how much the value in 1974 of these losses in 1975 were.

Q. Okay.

A. Again we're trying to figure out what the value in 1974 was for losses or gains in years after 1974. I used a six percent discount figure. Now, here again we have three different figures. We can use the rate of inflation [sic], we can use the prime rate of interest or the legal rate, and the legal rate is six percent. That has never appealed very much to economists except coincidentally. We've always preferred primary or the rate of increase in the Consumer Price Index. The reason I use six percent is because that is a better figure for later years and it's

actually over -- this understates the value of Payne's business, if I use that lower figure in 1975.

Q. So this would be a conservative result?

A. Yes, this is a conservative figure, and

[TR. 213]

I wanted to do it for consistency. Instead of using like a nine percent in '75, and then a six percent figure in '76, I figured I would just use a six percent figure for both years, even though this reduces the value of Payne's business slightly. It's not enough to make a big difference, though.

Okay. For 1976, what would have happened? Well, 1976 was a banner year, this was the best year in Chrysler's history, this was the best year in the American automobile history. General

Motors made the largest profit they had ever made. Chrysler made the largest profist [sic] they had ever made. American Motors made the largest profit they had ever made.

To see how well J. Truett Payne would have done in 1976, if they could have stayed in business, and I think they could have stayed in business because as I said, they suffered $81,000.00 worth of discrimination, and their losses in '74 and '75 would have only been $30,000.00, so I then went back to see what J. Truett Payne's best year was, and coincidentally J. Truett Payne's best year also was the best year that Chrysler had ever had prior to 1976, so the Chrysler Corporation's best year prior to 1976 was 1968. J. Truett Payne's best year was 1968.

[TR. 214]

In 1968 J. Truett Payne made $36,000 some odd dollars, a little more than $36,000.00. Now, how much would that $36,000.00 that Payne made in 1968 have been in 1976, recognizing inflation, the growth of the economy, growth in the Birmingham area, et cetera? Well, the method I used again was a conservative method. I decided to use the increase in profits that Chrysler itself came up with between those two years.

Now, Chrysler made approximately 33 percent more in 1976 than Chrysler made in 1968. It seemed to me then very reasonable to say that Payne would have made about 33 percent more in 1976 than it would have made -- than they made in '68. So they made a little more than $36,000.00. I think the exact figure was $36,800.00 that they made in 1968.

I increased that by one-third, and I came out to a round $50,000.00 is what Payne would have made in 1976, if they could have stayed in business until last year, and of course that has to be discounted and when I discount that at a six percent rate for two years, that is a present value in 1974 of $44,500.00.

Now, the question is, what would Payne have done in 1977? Well, '77 is a good year for automobiles, it's a better year for Ford and General Motors than it is for Chrysler. Now, remember Chrysler

[TR. 215]

had the best year in its history in 1976. This year they are not doing quite as well. I believe their sales were off about twelve percent as opposed to last year. So I figured that Payne's profits and sales probably would have fallen off for 1977, and so I estimated that

although 1977 will be a good year, and all of the signs are favorable, that the economy is starting to pick up even after the bad winter, that Payne still would have made at least $20,000.00 this year, and when this was discounted back to 1974 values that comes out to $16,792.00 using six percent discount figure.

By the way, I said the economists don't usually like the legal six percent figure. We've got a very nice coincidental situation today. The rate of inflation is about six percent, the prime rate on interest is six percent, and the legal rate is six percent today, so it's one of those happy coincidences in history when they all come together to use the same discounting figure, and there is some reason to believe that this will stay that way over the next six to eight

months.

Okay. For 1978, again we are trying to figure out what's going to happen. I suspect that '78 will be about as good a year as 1977. There

[TR. 216]

will be changes in the American automobile market, no doubt, but basically in terms of predictions of what happens to Gross National Product, the rates of inflation, et cetera, '78 looks like it ought to be a slightly better year than 1977. Looks like it will be --

MR. FORMAN: Your Honor, I'm going to object to him going any further. This is pure speculation. He even said he just suspects this.

THE COURT: I sustain with respect to '78.

Q. All right. Dr. Ignatin, then based on up through your judgment in '77

as to the performance that J. Truett Payne Company would have had, had it stayed in business, can you give us your opinion as to the value of the company as far as its value as a going concern in 1974, when it went out of business?

A. Okay. Up through 1977, I can add that, it comes out to about $32,000.00 in additional value which is to say $32,000.00 would be the discounted value in 1974 of the earnings from 1974 through 1977 that Payne would have earned if they had not been subject to this discriminatory bonus and rebate program, and if they had stayed in business through 1977, so that was $32,000 -- approximately $32,000.00

[TR. 217]

I think it comes out to $31,858.00.

Q. All right. What's the --

A. Well, that's not precise. That's more precise than -- somewhere around $32,000.00.

Q. All right. Now --

A. Now, in addition to that, however, if the firm had stayed through 1977, it would have been a going concern, and it would have had a value in 1977. This would have a value to someone who would purchase the business.

MR. FORMAN: I object to this. He's already trying to recover future earnings, and now he's going to try to capitalize future earnings at some arbitrary date.

THE COURT: Overrule the objection.

Q. I'm interested right now in getting your value as to your opinion in 1974. I think you're getting to it. I just want the value and then we can talk about how you got it.

A. I wanted to go back on that. What I'm trying to do again is see how much Payne would have earned or lost over those next four years, and then the question is, what would the value of that firm have been in 1977, and then try and discount that back to 1974 values.

[TR. 218]

Q. Okay.

A. So the question is, how much would this firm be worth in 1977 to a prospective buyer in the Birmingham market who wanted to go into business and take over a going concern which is now profitable and faced with non-discriminatory rebates and bonus programs, and what I was assuming then was about a $20,000.00 a year net profit, that how much is the firm worth that's makeing [sic] about $20,000.00 a year, and the answer is we use a discount figure of ten percent, a

conservative figure, and say that the capitalized value of that firm in 1977 would have been $200,000.00. That's what a prospective buyer would be willing to pay to get an income stream of $20,000.00 a year.

Q. And then you discount that figure of $200,000.00 back to 1974 dollars?

A. Discount that figure back into 1974 dollars. Now, again I did the figure of 1978, $200,000.00 in 1978, at a six percent rate of discount would discount to a value of $158,400.00 in 1974. If we discount it back from 1977, the value of that firm would have been about $170,000.00, and I don't have it exactly because --

Q. Well, your best judgment.

[TR. 219]

A. -- my calculator battery went dead.

Q. Your best judgment is what we are interested in. Approximately $170,000.00?

A. Yes.

Q. Do you take into account at that time -- you said the value as a goind [sic] concern would be $170,000.00?

A. Yes.

Q. Do you take into account the losses during --

A. Yes.

Q. -- this time?

A. We take into account the losses and the gains which would have netted out to a plus $32,000.00.

Q. Oh, I see. The $32,000.00 figure is taking into account the losses over the past five years, and the gains over the next three?

A. Correct.

Q. Okay. So that's your figure then, $170,000.00?

A. He had $32,000.00 worth of net earnings which offset the losses or the total would be $32,000.00 in 1974 dollars plus an additional $170,000.00, and since these are just rough figures because of my calculator problem, what I'm saying is that this method says that the value of Payne's business in 1974 when he went out of business was right around

[TR. 220]

$200,000.00. Now, the first method gave me $100,000.00 That was $170,000.00 plus the 32.

Q. Oh, I'm sorry.

A. So it should be about $200,000.00. So these are the two methods. As I say, I prefer the second method. I think it's a more reasonable figure.

Q. Do you think that this method that I am writing on the board now is the more

reasonable method?

A. Yes, that is a more reasonable method, because it's not based on this constant gain of value over the twenty year period between 1955 and 1974.

Q. Now, I want to ask you, you've been through the methodology and how economists value companies. Is that standard in normal practice to value companies in that method, by that method?

A. Yes.

Q. And accepted in the practice of your field?

A. Yes.

Q. I'm sorry, you'll have to speak up.

A. Oh, yes. Yes, yes, it is.

Q. All right, sir.

MR. FORMAN: Your Honor, I would like to

[TR. 221]

move to strike all of this testimony concerning the going value of the concern either on the first method or the second method. It's all based on speculation. It's one assumption after another. There is no relation of that to the Birmingham market, and he says Chrysler may have had a good year. He doesn't say whether the Birmingham market is a good market for Chrysler or a poor market for Chrysler. He in no way relates anything back to what was happening here in Birmingham.

THE COURT: Overruled.

[TR. 222]

Q. Just one moment, Judge, I think I'm about through.

Doctor, in your opinion as an economist, did these rebate programs that you've studied have a good or an adverse effect on competition between

the four dealers, four Chrysler-Plymouth dealers in those years?

A. Oh, I think it reduced competition. I think it was an injury to competition. As I said before, it had a two-pronged effect. It reduced Payne's ability to compete, and by reducing Payne's ability to compete, it reduced the need for these other companies to compete as vigorously. So it reduced the vigor of competition in the Birmingham market for Chryslers and Plymouths.

Q. Thank you. Judge, at this time I would like to offer into evidence the exhibits that we have used as summaries of those programs which we had previously offered. We identified them all in Dr. Ignatin's testimony.

THE COURT: All right.

MR. FORMAN: Your Honor, we would

to object to those, these been no showing, not even a basic showing that those dealers are actually in competition, no showing by this expert that he's

[TR. 223]

made any study along that line.

THE COURT: Overrule the objection.

CROSS EXAMINATION

[TR. 228]

Q. Dr. Ignatin, is it a fair statement of your testimony that the programs in which you have concluded that there is some discrimination, results in some discrimination of price, are the programs where you have basically taken the amount of money which, say, J. Truett Payne Company made, divided the number of cars that he sold during the time of that program into that figure, and come up with a payment per unit, and when that payment

per unit differs, you have considered that to be discrimination?

A. Yes. Again, what I did is, I took the amount of rebate on each car line group that J. Truett Payne received, and I divided that by the number of cars that Payne sold, and that gave me the rebate per unit that Payne got on that car line group.

I then went to the other dealers and took the amount of rebates they got for each car line group, and divided that by the number of cars sold in each car line group, and where there was a difference, I would then take the difference in per unit rebate that the other dealers got, and subtracted what Payne got on a rebate per unit, and I multiplied that by the number of cars sold

[TR. 229]

by Payne, and that was the difference

between the two, or what I would call the difference due to the discrimination, yes.

Q. Okay. The difference in payment, and you said that was the discrimination?

A. Yes. There was a difference per unit in the payment Chrysler made to the dealers.

[TR. 255]

Q. Dr. Ignatin, I believe you've testified on your direct examination that you felt these sales incentive programs had an adverse effect on competition, one, in a sense, because J. Truett Payne's salesmen could not, as you say, discount, could not discount the price of the cars?

A. As much as --

Q. As much as the other dealers?

A. Uh huh.

Q. And because you say the other

dealers are insulated from competition?

A. Yes, because J. Truett Payne could not discount their cars as much as they otherwise could have. This meant that the other firms did not have to discount their cars as much as they would have had to.

Q. You say the effect of this would be, the price that the ultimate consumer would have to pay might be slightly higher?

A. Yes.

Q. Let me ask you this: do you have any evidence that the other car dealers discounted their cars more than J. Truett Payne Company did during the period '71 through him going out of

[TR. 256]

business, the date he went out of business on May 28th, 1974?

A. No, I did not compute that.

Q. Let me ask you this: if the other dealers took the incentive money and simply ran it through the corporation into their pocket, the pocket of the principal stockholders, what effect would that have on J. Truett Payne Company?

A. Well, the fact that Payne did not get the money to run through to its stockholders, of course, injured Payne, but their ability --

Q. It injured the stockholders?

A. Yeah. It would injure the stockholders of the Payne corporation, if they didn't have that money to run through. But it would also reduce the ability of the Payne people to compete.

I'm not too sure exactly how you just run that money through. This rebate is, in fact, a reduction in the cost of the car that Chrysler is getting from these dealers.

[TR. 257]

A. The point that I am trying to make is that exactly what these firms do with it is not at all clear. The effect as it hits Payne, however, is that they get a lessened ability to compete.

Q. I don't understand how they have a less ability. Let's just say the dealer pays all the -- let's say Roebuck --

A. Uh huh.

Q. -- receives more incentive money, all of his incentive money is paid to his salesman as, say, a commission.

A. Uh huh.

Q. The price that they are selling the car for may not be lowered. How is that going to have an adverse effect on J. Truett Payne Company?

A. Well, in that case, if they didn't lower the price -- of course, the

salesman can lower the price. The ultimate deal is worked out between the salesman, the sales manager and the customer,

[TR. 258]

and the salesman in selling the car, since he's getting more for the car, will try harder, and one of the methods salesman have in the automobile industry of trying harder is to reduce the amount of commission they make on the car.

A typical salesman might figure if he sells the car for $5,000 he will make $500, this is just hypothetical. If he knocks the price down to forty-eight hundred dollars he might make only $400. Well, he might just want to do that. And with this extra money coming in, of course, he's got the ability to do that and compete, whereas, the Payne salesman and the Payne Company does not.

Q. But in effect if the other company did not lower their price, the J. Truett Payne Company is not going to be adversely affected by competition, isn't that a fact?

A. Well, if both companies charge the same price, then the gross profit would be different per car. And, yes, it would hurt Payne. They would be getting less per car than the other company would by the amount of that difference in rebate.

[TR. 260]

Q. Doctor, when you gave us your calculations of the goodwill of J. Truett Payne Company as of May 28, 1974, you used two methods?

A. Right.

[TR. 261]

Q. The first method, in effect, you discounted -- well, let's go through that.

A. O.K.

Q. In the first method, you attempted to determine the goodwill of J. Truett Payne Company after the merger between J. Truett Payne Company and Leseur which occurred in 1955?

A. Right.

Q. And you said that Leseur, in talking to Mr. Payne, you decided that Leseur had twenty-two thousand five hundred dollars of goodwill?

A. Correct.

Q. Did you see any books or anything to verify this determination?

A. No.

Q. You say you also had to take Mr. Payne, Mr. Payne's statement that the goodwill value of his business was twenty-five thousand dollars?

A. I took that in court. I had determined from my own conversations

with Mr. Payne that his goodwill was on the order of thirty thousand dollars.

Q. How did you determine that?

A. That was based on his estimate that his firm was worth about a hundred thousand dollars, that when he had merged Leseur into his company or his firm

[TR. 262]

into Leseur, whichever way it went, that his firm was worth about twice as much as Leseur's and that he had paid about twenty-two thousand five hundred for the goodwill of Leseur. So, I had estimated that Payne had around thirty thousand dollars worth of goodwill in his own business at the time of the merger. Now, I understand that in court Mr. Payne had said about twenty-five thousand dollars. So, that was about a five thousand dollar difference between the estimate I had made and what Mr. Payne himself said in

court.

Q. You never made any independent study of any records to verify that Mr. Payne's company may be worth twenty-five thousand dollars, did you?

A. No, I did not.

Q. So, what you did, you then totaled the twenty-five thousand and the twenty-two thousand five hundred and came to a figure of forty-seven thousand five hundred dollars which was goodwill value of the merged company in 1955?

A. Yes, as an estimate, as a bench mark, as a bench mark to check on the other method which I find preferable.

[TR. 264]

Q. Let me ask you this. When the companies were merged, the name of Leseur was dropped, was it not?

A. Yes.

Q. Don't you believe that would

eliminate some of the goodwill, if not a large portion of the goodwill attached to that company?

A. It might. It would depend on exactly how the merger was done, the advertising campaign at the time. As I understand it, Mr. Payne took over the Leseur Agency and the location. So, there would be some -- there's a trade-off in there also that -- goodwill isn't based on the name in the sense of the name. When we use the term name, we're talking about the reputation of the dealer, and the question would be did Payne then acquire the reputation of Leseur when he acquired the company and the location.

Q. You have no way of estimating that, do you?

A. Well, from what he said he paid for it. Whether he got it was another

story.

Q. Whether it disappeared after he took over would be a different story?

A. It might and it might not. We don't assume that it disappears just because he took over. He paid for it. He assumed it and then he started

[TR. 265]

dealing. Whether it disappeared, I don't know.

Q. Well, after you made this initial assumption that it was forty-seven thousand five hundred dollars as the goodwill, and that's what it is, an assumption, you then took a discount figure of four percent?

A. Yes. It's not a discount figure in this case. I increased the value by four percent per year for the next twenty years until 1974.

Q. And that was based on an

inflation rate and the interest rate?

A. Yes, a combination of the two, a rough average of the two.

Q. Did you take into any consideration in arriving at the four percent figure the automobile market during that period, whether it was good or bad, its ups and downs?

A. Well, this is one of the reasons why I don't think this method is all that good and why I used it as a bench mark. The market went up and down over the years. He had some good and bad years over that twenty year period.

Q. How do you know that?

A. Through talking with him and seeing some of his financial statements.

[TR. 266]

Q. What financial statements did you see?

A. I saw them going back to, what,

1966, I believe, his profit and loss figures. I believe it went back to '66.

Q. You have nothing between '55 and '66?

A. No, I did not look at them. I just relied on my conversations with Mr. Payne.

Q. And by using this four percent figure, you determined that the goodwill of J. Truett Payne Company on May 28, 1974, was a hundred thousand? Is that your --

A. I don't have my calculator. The figure I have is a hundred fifteen thousand based on the fifty-two thousand five hundred that I had done previously. Forty-seven thousand five hundred times four percent per year for twenty years ought to come out to around a hundred thousand.

Q. So, to get --

A. About a hundred and two thousand.

I saw somebody doing the figure. I would guess around a hundred and two thousand.

Q. And you used this as a bench mark to verify your next figure; is that right?

A. Yes, to see how my next figure comes out.

Q. Your next method, your second method really

[TR. 267]

consists of trying to speculate as to what the market is going to be over the next few years?

A. And what the market was in 1974 and how well Payne would have done given non-discriminatory programs, say, rebates and quota programs that treated all dealers equally.

Q. Let me ask you this. Why do you pick to begin with the year 1974?

A. Well, because that's when we are trying to figure out what the value of

the firm was.

Q. Isn't it a standard practice to look at what the past record of the firm has been and then capitalize that figure over some period to determine the going concern of a business?

A. Yes, that's one method, yes.

Q. In fact, when you explained your methodology to me, you started with the year 1973, did you not, in one of your initial calculations?

A. I don't recall. I'm trying to think.

Q. Let me ask you this.

A. I think the question as it was put to me the other day was what was the value of the firm in May, 1974, and I said, well, you could figure out, well, one method you could use is to take 1974 and figure out what the stream of earnings from that point would be.

[TR. 268]

Q. Let me ask you this, Doctor. If you totaled up -- you have a copy of Mr. Payne's dealer records or dealer statements for the year '71 through the first quarter in '74?

A. Yes.

Q. If you had used those figures and had deducted from that figure your eighty-one some odd thousand that you figure he had payments coming to him, would you arrive at a loss or a profit for Mr. Payne over that four year period?

A. He would have lost about thirty thousand dollars.

Q. In fact, if you use the entire year of '74, you estimated he lost another twenty thousand?

A. I showed you that he had lost twenty-two thousand during the first four months of '74, but that he had suffered

discriminations of about sixteen thousand, so that for his total year he would have lost a total of twenty thousand.

Q. The first year -- you started in '71. Even adding in this figure of eighty-one thousand that you contend is his amount he's entitled to in incentive payments, the first year that you would show him making a profit would be in 1975?

A. 1976.

[TR. 269]

Q. '75 he lost again?

A. Yes.

Q. That's right, he did, didn't he. In fact, he lost another twenty thousand dollars?

A. No. He would have lost ten thousand in '75.

Q. And how did you determine he would have lost ten thousand?

A. Well, based on the fact that he was losing twenty thousand dollars in 1974 on a yearly basis and '75 would have been a bad year, but not as bad as '74 given the recovery of the economy during '75, the reduction in the rate of inflation and some of the solving of the problems in the car industry.

Q. You decided that it would be only half as bad?

A. Yes. '74 was a very bad year. Everything came together in 1974 to mess up the American automobile industry.

Q. Did you make a study to see what was actually happening in the automobile market in the Birmingham, Alabama area in 1975?

A. No, I did not.

Q. Do you know whether the Birmingham, Alabama sales area is a good sales area for Chrysler Corporation or a poor sales

area?

[TR. 270]

A. You mean relative to the country as a whole?

Q. Yes, that's right.

A. From some of the data I've seen, Chrysler did relatively poor in the Birmingham area than they did to the country as a whole, at least in the early years. I don't have it for 1975.

Q. Doesn't the failure to take that into account go considerably to your credibility of this ten thousand dollar figure you have arrived at as a loss figure for the year 1975?

A. The ten thousand dollar figure for 1975 is based on the year 1975 and is related to the previous years. Now, we do have previous results for Payne going back quite a long ways and Payne was a profitable dealer for many years in the

past regardless of how well Birmingham did relative to the country as a whole. He did suffering a lot of troubles in about 1970 and this was when these programs came in and started affecting him. My estimate of the ten thousand loss in '75 was based on the assumption that these discriminatory programs ceased to be discriminatory, that they continued to offer them on a non-discriminatory basis and Payne would then be able to compete on an equal basis with the other dealers in 1975 and I still thought that he would

[TR. 271]

lose money in '75, but not as much as he lost in '74.

Q. You say the sales incentive programs did not have an effect until 1970?

A. No, I did not say that, or if I did, I did not mean to say it. I did not

study them before that. I was actually told that I should study them and it was irrelevant to the case.

Q. The year 1976, you say it's going to be a banner year for Chrysler and for the automobile industry?

A. Yes.

Q. And so, then, to determine what J. Truett Payne Company would have done, assuming that it would have stayed in business that long, you looked at what he did in 1968 which on the information you have was his best year; is that right?

A. Correct. It was also Chrysler's best year prior to 1976. So, Chrysler had the best year in their history in 1968, Payne had its best year in history in 1968. I don't find that particularly coincidental.

Q. Let me --

A. Chrysler did have the best year

in its history in 1976. It is not unreasonable to assume that Payne would have had the best year in their history in

[TR. 272]

1976. Just as everything came together in 1974 to make 1974 a disaster, a lot of things came together in 1976 to make it a wonderful year for the American automobile industry.

Q. Did you make any determination how the industry did in the Birmingham, Alabama area on that date?

A. No.

Q. Did not. Did you make an analysis to see what the market structure was or where the locations were for the Chrysler Plymouth dealers in 1968 as compared to 1976?

A. The change I think is that in 1968 Vestavia or Hall was in Bessemer.

Q. That's right.

A. And I believe are still in business. They go in and out of business.

Q. Do you feel that the transfer of the dealer from Bessemer to Vestavia may well have affected what Mr. Payne would have done, may have prevented him from making as much profit than in '68?

A. Well, there are two things. Bessemer did move from Bessemer to Vestavia. So, if Vestavia were in existence in 1976 and were in business in Vestavia, this would take some of the business away

[TR. 273]

from Payne from that area; however, that area also is the most rapidly growing area in Birmingham in terms of both population and incomes and a very good area for car sales. The data we have and the most recent study that was done

for the City of Birmingham, which they didn't like by the way, by Brookins Institute, I'm sorry, Patelle Institute in Columbus, Ohio, indicates that almost, about half of all the population growth in the Birmingham area since 1970 has occurred in that part of the county, the southern part of the county and over into Shelby County.

Q. Well, if there was a dealer located out there at that time, that might substantially or might very well keep those people going to that dealership, wouldn't it?

A. Well, except that the data shows that Payne did a good part of his business in that area and that these people to a large extent, from a study I have done involving work habits, these people do work downtown, and other studies the marketing men have done indicate that

people do have this trade-off between purchasing from dealers near their house as opposed to where they work. Generally marketing people feel that a person would rather on a balance buy near his place of business rather than his place

[TR. 274]

of work. What you are saying, though, is basically correct, there would have been increasing competition between Payne and Vestavia in that area. What I'm saying is that in addition to that, however, this was such a rapidly growing area and that this was strong competition between Vestavia and Payne that both companies would have benefitted from this tremendous expansion in population and incomes in that area.

Q. And Mr. Payne would have received fifty thousand dollars in that year?

A. The fifty thousand dollars he would have received would have been the total from all his sales, not just those in the southern area. Yes.

Q. The year 1977, a good year, but not so bad for Chrysler, not as good as '76?

A. Right.

Q. Where did you get those figures?

A. Out of the Wall Street Journal.

Q. Did you check anything else?

A. Well, the Wall Street Journal shows car sales, total number of car sales for each company. It shows profit levels by quarter.

Q. Isn't the answer to my question no, you didn't check anything else?

[TR. 275]

A. Other sources?

Q. Yes.

A. No. The Wall Street Journal, they

summarize other sources.

Q. But, nevertheless, you decided you would knock down the profits there about half, then?

A. I went to twenty thousand dollars, yes.

Q. And what's the basis of that?

A. Well, it's more than half. I went from fifty to twenty thousand dollars. Chrysler sales in the country as a whole have been falling off. They're about thirteen percent below, twelve and thirteen percent below what they were in 1976. So, I'm assuming that the sales of Payne would have fallen in '77 relative to '76 and that the profits would have fallen more than their sales.

Q. And 1977, you then decided, -- the Judge cut you off, so you decided to determine the going concern value of the, or determine the value of the business in

the year 1977?

A. Yes. Judge Lynne said that it was too speculative to try to predict or estimate the amount of money that Payne would have made in 1978, so at that point I -- I had figured out what I thought they would make in 1978 and I discounted that. So, instead

[TR. 276]

I went back and changed and said, well, what was the value of the firm in 1977 as a going concern if it had stayed in business until 1977 had it been able to enjoy these two really good years after so many bad years which had hit the entire industry.

[TR. 277]

Q. Amd [sic] then you decided -- you assumed that you would be receiving $20,000.00 from then on?

A. That that would be a reasonable

estimation of the future stream of profits that J. Truett Payne would have earned, and that this would be a reasonable figure for a prospective buyer.

Q. Now, isn't the automobile business an up and down business, depending on what the company puts out, what new cars it puts out?

A. Yes, it's very competitive in that sense, and it's also based to a large extent on the general economy, the health of the economy. You can use unemployment rates, you can use Gross National Products or disposable income. Sometimes we use meeting incomes. We use a lot of aggregate figures for an industry like the automobile industry.

Q. And you picked the rate of ten percent to capitalize those figures?

A. Yes, that's a conservative estimate. The prime interest rate right

now is around six percent. You can borrow a short term from those banks at eight percent. Inflation rate is about six percent. A prospective buyer figuring that he is going to get about $20,000.00 a year in profits from the firm, if he buys into it, would

[TR. 278]

tend to be conservative in his discounting figure in terms of capitalizing the value. He would be a little worried about it, and he would not want to capitalize it at a six percent figure which would give him the much higher rate.

Q. In fact, what risk factor did you add in for this being an atuomobile dealership in determining your capitalization rate?

A. I didn't add in any specific risk factor other than what had been taken

into account from the previous year's earnings. Actually I wrote a paper once indicating that any entering of risk factors was double counting, because you already have your risks into your expected values. In the general literature on economics and financing there is a little difference between myself and the accepted theory in the field. We have expected value on one axis, and risk on the other, and yet the expected value has within it a risk term which is to say in trying to figure out these risk terms what we are doing is making a probability estimate of what the value of the firm would be or the value of the earnings or losses would be in a given year, and part of that risk factor then comes down to the discount rate that you use which is to say we then

[TR. 279]

discount these back to 1974, and to put in an additional risk factor on this is double counting. You're using it twice rather than just once.

Q. You total all of this up, and you came to a figure of $200,000.00?

A. Yeah, that's my estimate without my calculator, which is to say $200,000.00 in 1977 discounted back to 1974 at a six percent rate of discount looked to me like it would come out to about $170,000.00, and I did not figure that out.

Q. Which is $70,000.00 over what you had determined the value would be based on the good will method?

A. That's $70,000.00 more than the bench mark estimate which I was just using in order to come up with it.

Q. And what you did on the method

you prefer is really that you had to speculate what the earnings were going to be in the future, and then capitalize that, assuming they are going to earn twenty thousand dollars forever after the year 1977?

A. No, based on earnings of $50,000.00 in 1976, $20,000.00 in 1977, and a reasonable probability that $20,000.00 per year with ups and downs thereafter would be a reasonable estimate of what

[TR. 280]

that dealership would have been worth, given the non-discriminatory programs, if Payne could have lasted until then, that a prospective buyer coming along at that time would have been willing to pay somewhere around $200,000.00 for that dealership.

[Tr. 443]

Q. All right. And does that -- we've been talking here for the last week about a number of sales incentive programs that are sponsored by the Chrysler-Plymouth Division of Chrysler for about 1971 through the first quarter of 1974, and were you responsible for the design and creation of those programs?

A. Yes, we developed them, I developed them and recommended them to management.

Q. All right. Now, how long has Chrysler utilized

[Tr. 444]

sales incentive programs?

A. To my knowledge since the early 60's we've used various forms of sales incentive programs.

Q. All right. And what is the --

this may be an obvious question but what is the purpose of the sales incentive program?

A. To stimulate our sales organization, our dealers to sell more cars.

Q. And you say to sell more cars. In relation to your competitors?

A. That's correct, to gain a larger share of the market place.

Q. Who are your major competitors?

A. General Motors and Ford.

Q. And where do you stand in relation to those two automobile manufacturing concerns?

A. Well, we are third, obviously the smallest of the big three. We're approximately half the size of Ford and maybe less than a third of the size of General Motors in terms of our sales.

Q. Now, can you tell us in terms

of percentage of the market, can you state it that way?

A. We do approximately 16 percent of the domestic market. General Motors does anywhere from 52 to 56 percent. Ford Motor Company does about 27 or 28 percent

[Tr. 445]

of the market.

Q. All right. Now, I want to direct your attention in general terms, if I can, to the sales incentive programs that were utilized during the period of 1971 through the first quarter of 1974, and specifically ask you -- I think it's already in evidence, but whether or not basically two types of sales incentive programs --

A. Well, we've used really various types of basic incentive programs. However, it may be more generally characterizing them. We've had wholesale

phases in some and wholesale-retail programs with the wholesale phase in some and other programs we've had them in retail only programs.

Q. And I think the evidence is that the wholesale-retail programs that you've described have some sort of wholesale purchase objective combined with a retail delivery objective or retail deliveries as a criteria for the payment of bonus, is that correct?

A. Right. We've paid always on the basis of retail sales and it may or may not have been tied in with a retail objective but in many of the programs we had a wholesale qualification phase.

Q. All right. Without going into any specific program or without belaboring the issue, can you tell us basically how the wholesale-retail program, I call

[Tr. 446]

it, works, in general terms.

A. We would first of all forecast a retail for the entire country, retail sales volume for the entire country. We would then break that down to a zone forecast of retail business.

Q. Now by zone you mean sales zone or sales regions?

A. That's correct. We have 22 zones today to comprise the sales areas of the United States. We then developed from that our production forecast and we then break that down into the zone forecast of production. In the wholesale qualification phase of our program we would determine each dealers share of that retail and of the wholesale that this individual -- that the dealers would buy to qualify for the program and if they purchase what we had requested them to do, they would then be

paid on retail sales.

Q. All right. Now, observing a number of those programs, it appears that there are levels of rewards or bonuses under these wholesale-retail programs, is that correct?

A. Quite often we would have differing levels of payments to dealers depending upon their performance against our objective. In other words, if we asked the dealer to participate by buying a hundred cars and in a program period, let's say, maybe three months, and if

[Tr. 447]

he only bought 80, he could perhaps participate at a lower level. If he bought at 100, he would get at somewhat a higher level and perhaps we might even have a third level where if he bought more than what we asked him to buy he would be rewarded even with a higher

level of payment.

Q. All right. We'll get to this in a minute, but let me ask you, the wholesale purchase objectives that are set, of course, in terms of numbers of cars, won't be equal in terms of absolute numbers of cars for each dealer, is that correct?

A. That's correct.

Q. All right. Would it be fair to say, however, that whatever objective is set that the same payment is made to each dealer provided they meet the same percentage of attainment of that objective?

A. That is correct. Our attempt or purpose in developing any program was to establish a base line by which all dealers could participate with equal ease in the program and then we would pay based on performance against

those objectives.

Q. Now, why do you at times have a wholesale qualification purchase phase connected with the retail sale bonus aspect?

A. Well, the program is designed to satisfy a

[Tr. 448]

current set of conditions or problems. Let us say that we foresee a build-up in inventories developing and we want to solve that problem, we then project a program that we feel will help alleviate the wholesale problem and encourage the dealer to sell more cars. Basically our purpose is always to increase our level of sales which is really the only solution or let's say the real solution to an inventory problem.

Q. All right. When you say you either have or anticipate an inventory problem, can't you just shut the factory

down or something like that to keep from having an inventory build-up?

A. Our programs are developed five months in advance. In other words, we've got to forecast five months in advance the exact number of cars we're going to sell. Now, that's humanly impossible to do. We'll either guess low or we'll guess high, so, you know, you've got to admit that there will be error to begin with. Those commitments then in terms of production that we have forecasted are transmitted to our suppliers and they set their production wheels into motion to satisfy our parts needs for the production that we have forecasted. If we are to foresee, or let's say that something happens in the market place that the retail business falls off from what we had forecasted and an

[Tr. 449]
inventory develops, to shut our plants down on a short term is difficult if not impossible to do. We require anywhere from two or four months lead time to shut our plants down. The alternative obviously is to increase our sales. Also shutting the plants down creates problems as well, creates problems for suppliers, creates problems for our workers, it creates problems in the communities that our people are employed in, so really if our forecast proves out the most favorable kind of solution we could provide would be to increase our business, increase our share of the market.

[Tr. 451]
Q. Now, as we discussed, you've got a wholesale phase of it or wholesale purchase and then you pay for retail sales. I mean what is the purpose? Is it the wholesale to obtain the purchase

of automobiles or is it the retail sale of automobiles?

[Tr. 452]

A. The basis -- the very basic purpose of every program is to increase our retail sales activity, for us to get a bigger share of the market place. However, and we're willing to lay out funds to do that. We're willing to lay out rewards and incentives, carrots in front of the dealer to get him to sell more cars. Now, we may also be looking at a problem with our own inventories or dealer inventories. Our own inventories where we have cars that are built at the factory that are unsold or dealer inventories where we can foresee the dealer -- his inventories are high and he will not order cars during this immediate period of time, to keep our plants going we would then have a wholesale qualification phase to move those

units which we can't stop building and then if the dealer does that we will pay him at retail which the purpose is to get him to sell more cars.

Q. Would it be fair to say that the payment is made on retail sales, it's not made on wholesale purchases?

A. That is correct.

Q. And the level of payment basically is based on the percentage of accomplishment of wholesale purchases?

A. That is correct.

[Tr. 453]

Q. All right. Could you tell us before we go into it in any detail, could you tell us generally what that formula is?

A. We -- in the development of a dealer objectives, we take what we call his rate of travel which is really a measure of his current sales performance and we also take a planning potential in

this period of time which is a measure of his expected performance, what we expect him to sell, and we weight those 50-50, 50 percent each, and develop the responsibility for each dealer.

Q. All right. Now, so it's a 50-50 formula, as I understand it, 50 percent is based upon what he's actually doing, his retail deliveries as you call it, and 50 percent on what he has been expected to do or

[Tr. 454]

his planning potential, is that correct?

A. That's correct.

[Tr. 460]

Q. And that way it gives an equal balance to your poor performers and your better performers, is that correct?

A. What we're trying to do is give every dealer an opportunity to participate in the program because, very frankly,

our most successful programs are the ones where we have the highest participation of dealers. If we can get 100 percent of our dealers in the program and they can all earn money, obviously they are all selling additional cars and the program is extremely successful, so we are trying at all times to put all dealers on the same base line so that they all can participate in the program.

Q. What would happen if instead of computing it on that basis you just set a flat number without any relation to anything, just say buy a hundred cars, everybody?

A. Well, it would be an unjust objective because, obviously, for one dealer a hundred cars is absolutely no problem and another dealer there's no way that he could ever participate in the program. He might sell a hundred

cars in six months or a year and we would be asking him to do it in, say, a three-month program. It would be unrealistic to assign such an objective.

[Tr. 462]

Q. Now, I also noticed, Mr. Piconke, that in some of the programs that were used during this period of time that there was no wholesale purchase objective involved,

[Tr. 463]

it was strictly just a retail delivery objective?

A. That's right.

Q. And many of those appeared to have some base line, that is, some minimum performance criteria which equaled a hundred percent of their objective, many of them were based on prior performance at an earlier time, is that correct?

A. That's correct.

Q. All right. Why do you at

times elect to use one and not the other?

A. The programs again, as I indicated, are designed to either reach for more business and to solve current problems. If we did not see an inventory problem and saw perhaps a market opportunity or let's say the dealer sales in a particular line were backing up although we did not have an inventory problem, we would run a retail only program with a retail only objective and reward dealers again for performance based against that objective, to help them move those cars and to help them put interest in their sales organization to sell that particular line of cars.

Q. Now, these retail objectives and those where you did not have a wholesale objective, I notice a number of them are based on some prior performance

at some earlier or current period of time. How did you

[Tr. 464]

select that particular period of time to use as the measuring rod, so to speak?

A. Well, we were looking for similar circumstances in the market place in trying to relate to it. In other words, if we ran a program, let's say, April, May and June, if it looked like the market conditions of this April, May and June were very similar to last April, May and June, we might simply say to the dealer, beat last year. It's a number that he knows, it's a number that is available to us and easily obtained, no calculations really are necessary and we would then ask the dealer to work against his own performance.

Q. But the period of time selected as the base measure would have some relation to the period of time in which

the program would be in existence?

A. That is correct.

Q. In terms of ability to perform?

A. That's right. We're looking for the same market situation. I'll not say we're looking for the market to be a little softer than last year. We might say 90 percent of last year is, for example, what you should do and we would pay at some level of performance against that 90 percent objective.

[Tr. 468]

Q. Now, once you develop one of these programs and put them into effect, how are the dealers notified? I mean, what information is given to them? How are they explained the situation?

A. Well, when we launch a program we send each dealer a letter, very generally explain the program, and to that is attached the rules which provide all of the detailed information about the

mechanics of the

[Tr. 469]
program and how the payments will be made to the dealer, on what criteria. We also develop instructions for our zone offices to make them as thoroughly familiar with the program as we possibly can and teach them how to calculate the earnings potential for each individual dealer. They in turn instruct their district managers and the district manager then contacts the dealer and encourages him to participate, outlines the potential earnings in the program and clears up any possible questions or impressions that a dealer might have about the programs.

Q. I notice that during the years, well, '71 to '74 the numbers of programs would fluctuate to a degree. Why is That?

A. Well, we would develop programs

based on our needs and the opportunities in the market place and very basically we developed programs when there are changes occurring, either up or down in the market place. When things are rather status quo is when it's most difficult to undertake programs which will result in increased sales.

Q. I also notice you have a fair number of programs or a good number during that period of time? Why is that?

A. Chrysler Corporation is probably more aggressive in the market place than General Motors and Ford. We

[Tr. 470]

are the smallest of the big three, we have to literally try harder to gain penetration. We've got to take away business from General Motors and Ford to increase our share of the market place and we would be expending these

funds to encourage our dealers to do so based on the opportunities that we saw in the market place.

Q I'll ask you whether or not one of the purposes of these sales incentive programs are to say stir competition among your Chrysler-Plymouth dealers in a sales locality?

MR. REEVES: Object to the form of the question, Your Honor.

THE COURT: I overrule that objection.

Q. You may answer.

A. It would really be pretty stupid for Chrysler Corporation to put monies, and I mean these are substantial monies. We may spend fifty, sixty million dollars, even more, in a given year on incentive programs. It would really be pretty stupid for us to spend that kind of money to simply redistribute the

sales that we were already going to get. Our whole purpose is to increase our share of the market and that's what the really entire automobile business is about, getting a larger and larger share of the automobile market that exists and we think these programs have contributed to successes at Chrysler.

[Tr. 473]

Q. Now, Mr. Piconke, are these programs, in your opinion, equally available to all dealers of Chrysler products?

A. Yes. We go through great pains and we are very determined to make sure that all dealers have the best possible opportunity, equal opportunity to participate in the programs because our purpose is to have as many dealers -- we would like to have all dealers participate in them.

Q. And I'll ask you again, I think I've asked you once before, are

these programs designed either through mathematical computations or through some prior performance of the dealer to be geared to the dealers own ability to perform?

A. That's correct.

[Tr. 475]

Q. Mr. Piconke, with respect to General Motors and Ford, do you know whether or not they utilized incentive programs?

A. Yes, both General Motors and Ford Utilize incentive programs to stimulate sales.

Q. Do you know whether or not they are in the form or in the nature of the incentive programs that have been used during this period 1971 through the first part of 1974?

MR. REEVES: I'm going to object to that, Your Honor. It's irrelevant.

THE COURT: I overrule that objection.

A. Yes, General Motors and Ford have run programs similar to us in that they have differing levels of payments for giving performance and, however, they do differ in one respect. They usually do not include a wholesale qualification whereas we have often used both wholesale-retail programs and retail only programs and General Motors and Ford usually use retail only programs.

Q. But they do sponsor programs that are based upon some set objective beyond which you must perform

[Tr. 476]

to obtain incentive funds, is that correct?

A. That is correct, and they provide differing levels of payments for those differing performance levels.

Eric W. Lindenberg

[Tr. 526]

Q. Now, I'll ask you where you

obtained -- let's take first J. Truett Payne Company -- where you obtained the gross profit figure of $252,389.00 there?

A. Okay. I guess first we ought to identify what gross profit is. Gross profit is what a dealer develops by selling his car at retail or at fleet to the customer. That figure, be it -- let's use, for example, on one vehicle, it's $5,000.00 and his cost to that car is he

[Tr. 527]

purchased it from Chrysler Motors Corporation at $4,000.00. The difference between that four and five is a thousand dollars which would be gross profit. Now, in establishing the cost of a vehicle, there's a number of things that go into that. You have salesmen's commissions, you have get-ready charges, a number of things that will build up the cost of that car besides just what they

paid to Chrysler Corporation at the factory. Okay. The incentive programs which you've been hearing so much about are also taken into consideration into that cost. The normal procedure used and it is recommended by the Dealer Uniform Accounting Systems, any incentive monies that are paid under these programs on these particular same cars we're talking about now are to be a reduction in the cost of the sale. So if we're talking about a cost of four, now we've paid a commission and we've paid a get-ready charge and we've gotten a fleet incentive as a credit back to that, then we come up, say, with a cost factor of $4500.00; so that means that the gross profit now is $500.00. That is the figure that shows here. It's the sum of all of those things as relate to the sale of new cars.

Now, in that figure as well is finance and insurance income. If they took this car that they sold for $5,000.00 and financed it through whatever the credit

[Tr. 528]

source, the bank, Chrysler Credit or what have you, and they receive an income from selling that contract to that finance source, that's also included in gross profit. So gross profit consists of not only the sale of the vehicle but any incomes that are derived from that sale which would be incentive monies, rebate monies, finance and insurance money, discount charges, all of these things go into it. Now, I would like to add the figure as it applies to two of these dealers --

[Tr. 530]

Q. Would you tell me where the -- how you derived the net income figures?

A. Okay. That's another step. An automotive accounting isn't as simple as it is in many other retail businesses. It's quite complicated. You have so many expenses that fall into the operation of an automobile dealership where you wouldn't have it in, say, selling a hamburger, but the net figure as it appears here on this exhibit is the net result of the gross profit that you get for that sale of that vehicle. Let's go back to that $5,000.00 car that we're talking about. We're down to a $500.00 gross profit after everything

[Tr. 531]

was considered. Now, in order for them to sell that car they have to develop many other expenses, expenses for advertising, expenses for having the facility to sell out of. There's a number of things that go into this expense account. So it's a difference

between that $500.00 gross figure and these other expenses that develop the net. The net is the bottom line figure in the sale of a new vehicle.

[Tr. 538]

Q. In examining Mr. Payne's dealership records and his financial statements, did you observe any areas in there which appeared to you from your examination to -- that may have or did contribute to his decline in profit picture during this period of time?

A. Yes, I did.

Q. What area was that?

A. Well, there were a couple of areas, but the primary area was the used car operation and the used car operation as it is shown here showed a considerable less income per unit than any of the other three dealerships. You can see that in your average gross column. The average gross that the J.

Truett Payne Company made on a used sale in the year of '71 up there is $104.00 as opposed to 291, 188 and 232 for the three other dealers.

[Tr. 539]

So in reviewing the financial statements and comparing J. Truett Payne Company operation to that of Roebuck's and Central and Vestavia, the primary area falls into used cars as far as the area that the dealership lost money in. Now, there was some variances in the service and parts division of this financial statement, but the amounts were rather insignificant and I'm sure they attributed to his loss, but the primary areas in this used car operation.

Dr. Martin Geisel

[Tr. 554]

Direct Examination

[Tr. 570]

Q. Now, with respect to the portion of Dr. Ignatin's testimony, Dr.

Geisel, dealing with his opinion on the effect of these sales incentive programs on competition, and I believe you heard him testify that he thought it would have a bad effect in the sense that it would insulate one dealer because he could use this money to offset the cost of the cars and it would disfavor the other dealer because it would give him an unfair advantage. Do you have an opinion on whether or not these sales incentive programs as you understand them would have such an effect upon competition among the Chrysler-

[Tr. 571]

Plymouth dealers in the Birmingham Metro area?

A. I do have an opinion.

Q. All right. What is that?

A. My opinion is that these programs would not have such an effect and indeed I think the facts show that

they did not have such an effect.

Q. All right. I'll ask you whether or not you made any calculations with regard to that?

A. Yes, I did.

Q. Let me get a blank piece of paper.

A. Should I describe what I did?

Q. Yes, tell us what you did.

A. All right. What I did was look over -- for each year from 1971, 1972, and 1973 and then for the total of the three years I looked at sort of the total impact of these incentive programs on the various dealers and by that I mean I took each year's total incentive payments to each dealer and divided by the number of retail units he sold, so we then have a number which is in terms of dollars per unit. Okay. How much incentive money on the basis of his

total sales did he get per car?

Q. All right. Let me stop you there. Did you take fleet automobiles out of it?

A. No. This is just retail sales.

[Tr. 572]

Q. Just retail. Okay.

A. The fleet sales, those are sales to large volume purchasers and there are special programs for fleet sales that Chrysler has, Ford has, and I don't know whether G.M. does or not, but those are separate programs and a dealer who sells fleets can qualify for bonuses in that respect too, and it would be inappropriate to mix those in with the --

Q. So you did pull the fleet sales out?

A. Yes, I did.

[Tr. 577]

Q. All right. Now, that's for the three years, I take it?

A. That's for the three years separately, that's correct.

Q. Now, let me ask you this question: Why did you divide the incentive earnings over the total units sold rather than try to divide it into -- by programs, say, into the units sold under each program and that method?

A. Well, I don't think there's anything wrong with looking at individual programs, but, first of all, you would expect that there would be some variance because

[Tr. 578]

the objectives depend on -- in part at least and sometimes in whole on prior rate of travel, so some months a dealer had, say, an exceptionally good March last year; well, then, he's got a tough objective to live up against on the

March contest this year, and somebody who had a bad March last year has got an easy objective, you know. So you expect to see from program to program some variation in who comes out on top and that's first of all.

Second of all, there are programs, if you remember those charts, there are programs of one sort or another going on most of the time. They don't -- do not necessarily cover all car lines at all times, but they cover -- there's generally speaking some program covering some portion of the cars, so that a major amount, a major fraction of total sales are covered by some incentive program.

Q. All right. Now, did you make the calculation for the entire period of time for those three years?

A. Yes, right. These are just the

totals of it by dealer.

[Tr. 580]

Q. No, that's not necessary. Now, I guess basically what that reflects is that divided over all of the units, Mr. Payne or J. Truett Payne was high on a per unit basis in '71 and '73 and low in '72, is that correct?

A. That's correct. He was number one out of four in terms of incentive payments per unit sold in 1971 and 1973. In contrast, he was on the bottom in 1972.

Q. When you take that three-year average he finishes basically ahead of Roebuck and behind Vestavia about a dollar to two dollars a car?

A. I would regard all three of those as being equal, I mean a dollar is -- it's true, Roebuck is $51.00, Payne is $52.00 and Vestavia is $53.00.

Q. All right. Now, with respect to those

[Tr. 581]
calculations, Dr. Geisel, do you have an opinion as to the effect that these sales incentive programs and the bonus monies paid thereunder would have had on competition arising out of the payment of incentive money?

A. Yes. In my opinion the -- any cost differentials to the dealers arising out of this are so insignificant as -- so that the effect on competition would be nonexistent.

Q. Could you explain that in a little more detail?

A. Well, what we're talking about really is a maximum difference between any of these dealers of $11.00. That's between Central and Roebuck over the three years. Okay. So, you know, for some period -- a short period of time there may have been bigger differences in one direction and then the things change and

somebody else has an advantage for a short period of time, but the maximum difference here is $11.00 between Central and Roebuck. Okay, and, in fact, three of the dealers within $20.00 of each other. It's my opinion that an $11.00 differential on a three, four, five, $7,000 piece of equipment is a rather minor negligible factor and that assumes really that, indeed, that $11.00 would go directly into the retail price which it might or might not do. All right. I don't think many people who lived out near Roebuck, say, for

[Tr. 582]

whom Roebuck was the natural place to buy would go to Central for $11.00.

Q. So is it your opinion then that even if you assume that money was used to reduce the cost of the car to the consumer that the amount of differential between the two would be so negli-

gible it wouldn't entice one customer from one Chrysler-Plymouth dealer to another?

A. I guess I would be willing to say that it wouldn't entice one customer to another in a sense that somebody might be willing to do that. I just don't think that's going to be quantitatively important. Not very many people are going to drive ten miles and, remember, they don't have to but they usually find it in their interest to have the car serviced where they bought it. Dealers tend to favor people who bought their car there, at least people think so, so it's not just one trip that they're going but it's several future trips as well. I just don't think there's room for much of that there.

[Tr. 584]

Q. I'll ask you whether or not you reviewed the dealer financial state-

ments for the years 1971, '72 and '73 of J. Truett Payne Company?

A. I did.

Q. Based on your observations of those financial statements did you come to any conclusion or reach an opinion as to what difficulties that dealership may have been encountering in its various departments during that period of time?

[Tr. 585]

A. Yes.

Q. Did you make any calculations with reference to that subject matter?

A. I did make some calculations.

[Tr. 587]

Q. Okay.

A. So what we see is, after the first two years in which we had information were profitable, from then on, from 1969 on, a period of five years and a partial sixth year of continuous losses in the business. All right. And that's

not due -- may be partially due to but -- well, new car sales fell in '69 and '70. They recovered again quite well in '71, '2 and '3. Okay. So, we're not likely to find the new car business as being a major source of problems in this dealership. It's true they are not back to where they were in '68.

Q. But that was, I believe, a good year for J. Truett Payne, is that correct?

A. This is the only information I have.

Q. Right.

A. And it's the best. All right?

Q. Okay. Now, what?

A. All right. So we looked elsewhere. Other departments in Payne's operation. All right. In the

[Tr. 588]

first place I looked was the used vehicle department and I also looked at

the service and parts departments. All right.

Let me talk about the service and parts departments first. All right. And I did this for 1970 to 1973. I looked at the net profit that was coming out of the service department, the net profit that was coming out of the parts department. What we mean by net profit --

Q. Tell me how you want me to set up these columns first.

A. All right. Let's have the year.

Q. All right.

A. This is for Payne now. Okay. Then let's say service net next to that.

Q. All right.

A. And then let's say, and I'll explain what this means next to that, PNUS.

Q. All right.

A. So for -- I'll give you the numbers and then we can talk about them. 1970, service net was $46,630.00.

Q. All right.

A. Per new unit sold is $85.00. In other words, that takes that $46.00, 630 and divides by the number of automobiles sold that year to see how much service profit is being made per car, per car sold.

[Tr. 589]

Q. All right.

A. Okay. Now, that's the service department. Now let's do the same thing for parts so it will be, instead of service net, it will be parts net there in the middle.

[Tr. 590]

Q. All right.

A. Now, let me explain, now that we have these numbers down here, let me

explain what service and parts net are. I guess as everybody knows in the automobile business they have a new vehicle department and a used vehicle department, parts department, service department. They may have a leasing department, other things, but the major things are new and used vehicles and parts and services. All right. And they keep there accounts on a departmental basis. Okay. So when they talk about service net or parts net, what they mean is this is the amount of profit. Okay. That's sales in the parts department, the price of the parts less the cost of the parts, okay, less the cost of the salary of the parts de-partment manager and any clerks that are around there, so all of the direct expenses of the parts department are taken out. Okay. So this net is what -- that's going to be the contri-

bution for paying the rent, paying the light bill and profit. Okay.

[Tr. 591]
And that's -- now, look what's happening in both of these cases. All right? Well, his business was -- his new car business was basically growing. Okay. Both his service and parts business is declining. Okay. So it's not a decline that's parallelling a new car decline. In fact, the new cars are, you know, going up from '70 to '71, okay, and then holding at a good level for '72 and '73. All right. Meanwhile the parts and service business is declining. Well, you would expect if the new car business is going up or holding steady that this business would go up or hold steady, so something is wrong here.

Now, I didn't make a detailed study of Payne's operation by any means, but this is the kind of thing that you can

see from a financial statement. There's something funny here. This business shouldn't be going downhill while the new car business isn't.

Q. In other words, in his parts and services you've got a continual decline from 1970 in services from 85 down to $31.00 in 1973, is that correct?

A. That's correct.

Q. And in the parts department you've got a decline from $96.00 down to $60.00?

A. Right.

Q. In 1973?

[Tr. 592]

A. Yes.

Q. All right. Now, you've used this per new unit sold?

A. Right.

Q. Why do you use that or is that your method or is it a standard method or how did you arrive at that?

A. It's a very common thing in the automobile industry. They have different initials that they use, sometimes it's PNUR, that's "Per new unit retail." I use per new unit sold here because I divided by both the total sales, retail and fleet, since that's what the service and parts business has done on all sales. Okay. That is a common measure. Those things are very common in the automobile industry for the simple reason that if you want to compare dealers or want to compare a dealer across years you have to correct for the size of the operation. Okay. This puts everythin on a common denominator. How much do they do per car? Okay. Well, a $200.00 car dealer is going to do a lot less than a $2,000.00 car dealer in total, but you can look at how much they did per car to compare them and it's

a standard procedure.

Q. Now, did you make any other observations with respect to the dealer financial statements?

A. Right. I also looked at the used car -- the

[Tr. 593]

used vehicle department. I did the same kind of calculation for 1970 to 1973 there, so if you wrote small, you might get it on the bottom or we could start a new sheet. On this one I actually went -- since I had the statements for the other dealers I actually went and compared year by year how they were doing, you know; in other words, made a comparison such as is indicated on that chart down there. But I'm doing the same thing here. Net profit, okay, from the used car departments, units sold, that's new units sold. Well, okay, net profit first. Units sold. There are used units

now.

[Tr. 599]

A. Well, again, without knowing why he's not doing the used car business. All right. Both has declined over time $51.00 per car net in 1970, then $13.00, 27 and 12 in '71, two and three. Okay. So, he's not doing well compared to himself. Okay. He's doing horribly compared to the other dealers. I mean the other three dealers have a much better used car business. I guess it's particularly striking for Roebuck which is a dealer -- a new car dealer of about the same size in terms of total new units sales as Payne and look at the difference in used car sales and profits. Okay. 25,000 versus 173,000, because he sells over twice as many and he makes three times as much on them. Similarly, even more striking in '73. Okay.

Q. And then going back to '71 and

-- '70 and '71?

A. Fundamentally the same picture there, although in '70 he was closer to the others, but still on the bottom compared to what they were doing in terms of, you know, bringing home the bacon in used cars, so to speak.

[Tr. 607]

Q. Let me stop you there for a minute. Did you look at the other dealers between, say, '70 and '73 or '74?

A. In connection with, you know, with these other

[Tr. 608]

studies, I did look at their financial statements and so I looked at what their net profits were.

Q. What about their correlation with Chrysler on a trend basis?

A. Well, I guess the earliest statements that I had available to me for Central and Roebuck were 1969. All

right? And they -- well, let me just read to the nearest thousand, Central's profits, $34,000.00 in '69, $33,000.00 in '70, $34,000.00 in '71, $72,000.00 in '72, $24,000.00 in '73 and $49,000.00 in '74. All right. Well, that doesn't bear much relationship to Chrysler's profits either. All right. For example, Chrysler did poorly in '74, Central had one of its better years. Chrysler did -- was at a relative peak in '73, Central was at its lowest year in this period.

Roebuck shows a similar lack of correspondence. $60,000.00 in 1969, $44,000.00 in 1970, okay, 1970 is the year when Chrysler lost money, Roebuck had a relative -- a decent profit. '71, $47,000.00; '72 was $35,000.00. '73, $50,000.00. '74, $48,000.00, again when Chrysler is losing money. It had no impact on this dealer. Did I say '74?

$48,000.00. Correct. It's probably true, incidentally, that that carries over into 1975 that Chrysler did have a very bad year.

Q. All right. Let me stop you just a minute.

[Tr. 609]

A. All right.

Q. We have introduced into evidence the dealer financial statements for Chrysler Motors Corporation -- for Central Motors Corporation and for Roebuck Chrysler-Plymouth and let me hand those to you and ask you what correlation, if any, you draw from that versus Chrysler Products?

A. Well, Central in 1975 -- 1975 is a disastrous year for Chrysler Corporation. I don't remember exactly what their losses were but their sales fell off, stayed at a low level from '74 and their profits -- I mean they had

huge losses. Central in 1975 made $73,000.00. Okay. Rounding it to the nearest thousand I'll say $74,000.00. And in 1976, okay, which is now a record year for Chrysler, their profits are essentially the same, $79,000.00. Okay? So in Chrysler worst year they had one of their best years. They had had a good year like that in '72 as well, $72,000.00 in '72 and they had $74,000.00 in '75 and $79,000.00 in '76. All right. But, you see, I think looking at these dealer profits that they are unrelated to the Corporate profits of Chrysler Corporation. Okay?

Q. In other words, it's your testimony that Dr. Ignatin's attempt to equate the performance of Chrysler Corporation with performance of a dealer at some future time is not sound? [Tr.610]

MR. REEVES: I object to the form

of that question, Your Honor.

THE COURT: I overrule the objection.

A. That is not sound in my opinion, yes.

Q. All right. Do you have any other comments relative to his computations?

A. Well, incidentally, since I have Roebuck up here, I would note that Roebuck in 1975 earned $40,000.00. It's one of his poorer years since 1969, but still a substantial profit. In 1976 Chrysler's best year, Roebuck only earned $7,000.00. Okay. It's worst year by far in terms of net profit.

Q. And you're taking the net earnings?

A. These are net earnings, that's correct.

[Tr. 617]

Q. And you don't disagree, do you, that the result of an individual

program or rebate or incentive program is to in effect reduce the price of the automobile purchased by the dealer from Chrysler, you don't

[Tr. 618]

disagree with that, do you?

A. I don't disagree with the fact that the effect of incentive programs is to provide dealers with payments. All right. Now, if you're asking me to say that that means that this particular blue Valiant over here cost $50.00 -- cost $50.00 less than that red Valiant over there, I would not agree with that. It provides payment for performing, for selling and buying and selling cars, okay? It has the net effect of reducing the overall cost of the vehicles, that's all.

Q. It has the net effect of reducing the cost of the vehicle?

A. Right.

[Tr. 705]

Q. Do you think it's unreasonable to devise an incentive program that pays a person an incentive based upon what he is able to do, what his strength is, what his potential is as opposed to the strength and potential of the other, say, Chrysler-Plymouth dealer? Is that a bad thing?

A. I would say that if you used a much better method than Chrysler used in Birmingham, it might have

[Tr. 706]

been fair. I really can't tell without having, you know -- it's a hypothetical question. What if they had used a fair non-discriminatory method? What would have happened? Well, what I have said is that what would have happened is Payne would have gotten $80,000.00 in

total monies and would still be in business today.

Q. Well, of course, you're ignoring the fact that he had lost another $30,000.00 on top of the 80?

A. No, I didn't ignore the fact that he had lost money. I said that he wouldn't have lost anywhere near what he had and counting in all of the monies he took out in executive salaries he would have unquestionably been in business today.

J. Truett Payne

[Tr. 711]

Q. (By Mr. Reeves:) One other question to Mr. Payne. Mr. Payne, you've heard some testimony today about -- and yesterday or Thursday rather about the used car operations at your facility during 1970 through '74. Can you tell the ladies and gentlemen of the jury whether or not you over-allowed for used

cars, and if so, why?

A. Yes. During those rebate periods when we didn't qualify, couldn't qualify, in order to meet competition and in order to sell new cars, we had to over-allow on our used cars. Now, that would naturally cut down on our profit on our used cars.

Q. What is over-allow mean, just for their information?

[Tr. 712]

A. It's this simple. If I have a customer that I'm trying to sell a new car to and if I offer him $800.00 for his car and he tells me that somebody else has offered him $850.00, in 99 cases out of 100 in order for me to get his business I've got to raise my bid on his -- on my used car to match the other bid. That's been going on since the beginning of the automobile industry. What people get for their used cars is of primary

interest to them. Now, the only way that I could do that, I was not getting any rebate on the program and I had to over-allow on the used car whereas if they had qualified for the program, in many cases they were getting $50.00, at some programs $100.00, some 30, but that put me at a disadvantage. It's that simple.

[Tr. 717]

MORNING SESSION 10:00 A.M.

THE COURT: The arguments are alloted one hour to the side. After the argument for the Defendant we will take a ten minute recess and then the Plaintiff will conclude.

All right, gentlemen, go to the jury.

[Tr. 727]

Dr. Ignatin testified that there were two methods to judge the value of a going concern, the value of his busi-

ness, his goodwill. The Defendants' own expert, Dr. Geisel, also agreed that there were two methods. He discounted the lower figure method. He said that Dr. Ignatin came up with, he didn't agree that that was the best way to do it. He agreed with the method of the second calculation that Dr. Ignatin used but he disagreed with the figure. He said it has some value but we don't know how much, it's a hard thing to estimate. But he did agree that Dr. Ignatin's principle was right. We have one figure Dr. Ignatin says is $100,000.00 is the worth of the business, and his other figure is $200,000.00. Well, for our purposes today, take the $100,000.00 figure as being the correct amount. If you add $100,000.00 and $81,000.00, we have shown the cost difference, you will see that totals $181,000.00, and that's

how much we claim and that we have proved that J. Truett Payne Company was damaged.

W I N T E R W I N N E R S

11/11/70 - 1/31/71

Paid on Sales After W/S Obj. Attained

Pur. Obj.	C/L Group	JTP Sales	JTP Reb./P.U.	All Others Reb./P.U.	Diff.
JTP - 99	Val-Bar	17	0	30	510
Central - 63	Bel-Sat	13	0	45	585
Bessemer - 39	Ch-Imp	42	0	60	2,520
Roebuck - 54	Fury	17	0	45	765
	Fy W/O	15	0	60	900
					$ 5,280

[Plt. Ex. 37]

W I N T E R W I N N E R S

11/11/70 - 12/31/70

(Floor Plan Rebates Portion - Paid on Purchase)

	Rebates P.U.	Purchases
JTP	$ -0-	72
Central	26.30	77
Bessemer	26.57	48
Roebuck	41.05	95

TOTAL REBATES JTP WOULD HAVE RECEIVED - $2,955.60

[Plt. Ex. 38]

1971 BIG DOLLAR PAYOFF

1/1/71 - 4/30/71

Rebates paid on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	51	28.43	54.03	$1,305.65
Others	163	107.98	35.59	(NEG.)

[Plt. Ex. 39]

1971 BIG DOLLAR PAYOFF

1/1/71 - 3/31/71

(Floor Plan Rebates Portion-Paid on Purchases)

	Reb./P.U.	Purchases
JTP	$ 26.38	188
Central	.49	109
Bessemer	26.00	98
Roebuck	30.81	129

Total rebate JTP would have received - $5,792.88

JTP received $4,800.00. Difference - $ 992.28

[Plt. Ex. 40]

S U M M E R S E L L O U T

3/1/71 - Fall, 1971

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	ROE. Reb./P.U.	Difference
Val	110	$ 9.41	$25.00	$ 1,715.00
Bar-Sat-Fy	103	11.65	60.00	4,980.00
Ch-Imp	61	13.20	70.00	3,465.00
				$10,160.00

[Plt. Ex. 41]

W I N T E R P R O F I T D A Y S

11/21/71 - 1/31/72

Paid on Sales After W/S Obj. Attained.

C/L Group	JTP Sales	JTP Reb./P.U.	ROE+VEST Reb./P.U.	Difference
1972 Val-Bar	28	-0-	$ 35.00	$ 980.00
Sat	10	-0-	55.00	550.00
Fy-Ch-Imp	43	-0-	65.00	2,795.00
1971 Val-Bar	8	-0-	70.00	560.00
Sat	7	-0-	-0-	
Fy-Ch-Imp	15	-0-	130.00	1,950.00
				$6,835.00

[Plt. Ex. 42]

S T O C K E L I M I N A T O R

8/11/71 - 1/31/72

Rebates Paid on All Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Hall Reb./P.U.	Difference
Compact	40	$ 68.75	$ 68.18	(NEG.)
Other	108	100.00	100.00	

[Plt. Ex. 43]

C H R Y S L E R - P L Y M O U T H S E L L N O W

1/1/72 - 4/30/72

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Vestavia Cen+Roe Reb./P.U.	Difference
Val-Bar	81	$17.72	$35.00	$1,400.00
Sat	30	14.67	55.00	1,210.00
Fy-Ch-Imp	72	52.22	65.00	920.00
				$ 3,530.00

[Plt. Ex. 44]

CHRY/FY PROFIT PROGRAM

1/1/72 - 3/31/72

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Bessemer Reb./P.U.	Diff.
70	$10.00	$82.76	$5,093.10

[Plt. Ex. 45]

C A S H I N W I T H C H R Y S L E R

5/1/72 - 6/30/72

Rebate Paid on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
31	$25.81	$80.43	$1,693.48

[Plt. Ex. 46]

C L E A N - U P A N D C A S H I N

7/1/72 - Fall 1972

Rebate on Sales

JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
86	$39.53	$94.44	$4,722.22

[Plt. Ex. 47]

1 9 7 2 S U M M E R S W E E P S T A K E S

4/1/72 - 7/31/72

Rebates on Sales

C/L Group	JTP Sales	JTP Reb./P.U.	Central Reb./P.U.	Diff.
Val-Bar	79	$ -0-	$ 42.02	$ 3,319.58
Sat	45	-0-	68.65	3,089.25
Fy-Ch-Imp	140	-0-	110.00	15,400.00
				$21,808.83
JTP received $9,689 stock rebate on 5%/P.U. but would have made $12,119.83 more under terms of rebate program.				- 9,689.00
				$12,119.83

[Plt. Ex. 48]

C H R Y S L E R - P L Y M O U T H T R I P L E - P A Y

10/1/72 - 12/31/72

Rebates Paid on Sales

El. Units	JTP Reb./P.U.	Central Reb./P.U.	Difference
152	$6.91	$49.23	$6,432.64

[Plt. Ex. 49]

F U R Y - C H R - I M P T W I N D E A L D O L L A R S

1/1/73 - 3/31/73

Rebate Paid on Sales

C/L Group	El. Units	JTP Reb./P.U.	ROE Reb./P.U.	Diff.
(3)	55	$3.636	$78.125	$4,096.88

[Plt. Ex. 50]

CHRYSLER-PLYMOUTH EARLY

CLEAN-UP BONUS PROGRAM

6/1/73 - 1974 Model Day

JTP and Central opted for a Non-Discrimina-tory Program which gave them a 5% rebate on each 1973 Unit.

[Plt. Ex. 51]

S U P E R E A R N I N G

1/1/74 - 3/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb./P.U.	Roe. Reb./P.U.	Diff.
Val	48	-0-	-0-	-0-
Sat	12	$ 35.00	$100.00	$ 780.00
Ch	19	50.00	150.00	1,900.00
'73 Ch	33	100.00	300.00	6,600.00
				$9,280.00

[Plt. Ex. 52]

P R I M E R A T E O N E I G H T S

4/1/74 - 5/31/74

Paid on Sales After W/S Obj. Attained

C/L Group	JTP Sales	JTP Reb. Rec'd	Others Reb./P.U.	Diff.
Val	13	-0-	$ 50.00	$ 650.00
Sat	5	-0-	100.00	500.00
Ch	12	-0-	150.00	1,800.00
'73 Ch	19	-0-	200.00	3,800.00
				$6,750.00

[Plt. Ex. 53]

"C" BODY BONUS
2/1/74 - 3/31/74
REBATES PAID ON SALES

El. Units	JTP Reb./P. U.	ROE. Reb./P. U.	Diff.
33	$163.64	$90.91	-----

[Plt. Ex. 54]

	DEALER	ADDRESS	EXTENT OF OWNERSHIP INTEREST OF CHRYSLER MOTORS CORP. OR CHRYSLER CORP.	DATE OF COMMENCEMENT (Mo. & Yr.)	DATE OF TERMINATION (Mo. & Yr.)
1.	Hall Motor Co., Inc. dba Bessemer Chrysler-Plymouth changed to Vestavia Chrysler-Plymouth	1024 Montgomery Highway, B'ham, Ala.	None	5/63	3/74
2.	J. Truett Payne Co., Inc.	231 South 22nd Street B'ham, Ala.	None	1/44	8/74
3.	Car Center, Inc. dba Roebuck Chrysler-Plymouth	8949 Gadsden Highway B'ham, Ala.	None	4/67	
4.	Hills Chrysler-Plymouth	1024 Montgomery Highway, B'ham, Ala.	100%	4/74	
5.	Central Motors, Inc.	309 3rd Avenue West B'ham, Ala.	None	4/61	

[Plt. Ex. 55]

Defendant's Exhibit One

DEPOSITION OF J. TRUETT PAYNE

[Def.Ex.1,p.14]

Q. Mr. Payne, I am going to show you a document entitled "Dealer Financial Statement" basically for the year 1967 for the period of 1/67 through 12/31/67, and ask you to look at that, and ask you if that is the financial statement that you filed for the year?

A. I assume that it is.

[Def.Ex.1,p.16]

Q. Mr. Payne, can you tell us what the item on Line 7, Miscellaneous Income, is composed of, or in large parts composed of?

A. I can't tell you exactly. I would have to guess. The auditor could tell you. But I would believe it would be bonuses of some type.

[Def.Ex.1,p.17]

Q. Factory Bonuses under Sales and Incentive Programs?

A. I would believe that. I mean I just don't know. You would have to get that from the auditor.

Q. Looking back on Page 1, again, if you would, Mr. Payne. And first let me ask you this question: is that traditionally the place where you show bonuses, or is there some other place on this financial statement where it appropriately should be shown?

A. I can't answer that question. I just don't know.

Q. And would it be a fair statement to say, Mr. Payne, that what in effect happened was that the Other Income offset the Net Operating Loss by approximately $6,000.00, giving you a net earnings of something over $6,000.00.

A. Yes.

Q. I will ask you a couple more questions if I could about some items on

here. On Page 1, Mr. Payne, in that block at the top of the page on your left beginning with Line 7, entitled Receivable, Item 15, or Line 15 entitled Special Vehicle Income, what is shown in there? I realize you show nothing in there, but what figures would go in there? What does that reflect?

A. I don't know.

Q. You have no idea?

[Def.Ex.1,p.18]

A. I can't answer that question, no, sir.

Q. Okay. On Line 18 there is a space for Inventory Rebates, do you know what would appropriately go in there though you show no entry there?

A. Would that be Inventory Rebate on new automobiles?

Q. I don't know. I am asking you.

A. Well, I am sorry. I can't give you the correct answer. I just

don't know.

Q. Well, Line 9 shown as Vehicle Accounts, you reflect the sum of $65,424.00, what would that sum of money represent, please, sir?

A. I don't know. I can't be positive.

Q. Do you have any idea and judgement as to what you think it might be?

A. Vehicle Accounts? I wouldn't know.

Q. I will ask you to look at the top of that page, on the right hand side the title "Liabilities and Net Worth," under the heading "Wholesale Finance Liability," which shows Total Wholesale Finance Liability of $545,490.75, and ask you what that represents?

MR. REEVES: First of all the form doesn't say that, or that you have in front of him.

Q. I beg your pardon, you are correct. The correction should be, the Total Wholesale Finance Liability is $545,490.75. [Def.Ex.1,p.19]

MR. REEVES: Well, assuming the 75 cents is on the original, we don't have that.

Q. Well, approximately $545,000.00.

A. Well, I would believe that that was the amount of floor plan on the inventory of new cars.

Q. Would that be the amount that you owed Chrysler Credit Corporation?

A. Yes, sir, yes, sir. In my opinion.

Q. Mr. Payne, if you would look on Line 11 on the left under Receivables again.

A. Yes, sir.

Q. Where it says Other Receivables. You show a figure of $72,470.26. What

does that sum Other Receivables represent?

A. I just don't know. I couldn't answer that.

[Def.Ex.1,p.20]

Q. I want to show you a document, Mr. Payne, it is the same document for the year, Dealer Financial Statement for the year 1968. I will ask you again to look on Line 69 on the right hand column Net Earnings, and ask you if it shows net earnings of approximately $36,140.00.

A. Yes, sir.

Q. And you signed that one, that is your signature on that one?

A. Yes, sir.

[Def.Ex.1,p.21]

Q. Would it be your testimony as previously that the $38,000.00 under Miscellaneous Income again would be from bonuses?

A. I don't know.

MR. REEVES: I think he said that was not his testimony. I object to the form of that question.

A. I just don't know what that is. You have got to get that from my auditor. I am just not familiar with it. I don't know what it would be, what it is.

Q. Well, I will ask you if you didn't respond on the prior inquiry on the 1967th Financial Statement that you thought that that was what it was.

A. But I am not sure. I am not sure about that.

[Def.Ex.1,p.37]

Q. All right. And this Miscellaneous Income which is a large portion of the Other Income you have no judgement what that represents?

A. No, sir, no, sir. I just wouldn't want to guess at that.

Q. Who is your accountant?

A. Marion Hardy.

Q. Mr. Hardy is still your accountant?

A. Yes, sir.

Q. And where does he reside?

A. Cleveland, Mississippi.

Q. And is he a CPA?

A. I don't really know. He handled our tax business all the time.

Q. Does he have the financial books and records of the corporation going back for a number of years?

[Def.Ex.1,p.38]

A. Yes, sir.

Q. He does have them in his possession?

A. Yes, sir.

Q. Do you have any financial records of the corporation for any period of time in your possession?

A. I don't know. I would believe that Mr. Hardy had them. I just don't

know.

[Def.Ex.1,p.44]

Q. Mr. Payne, there is an indication in here that your

[Def.Ex.1,p.45]

physical facilities were something less than desirable. Would you have agreed with that observation?

A. Yes.

Q. When was that building constructed, do you know?

A. I don't know. Was it 1925? Or 1935? I just don't remember.

Q. It is an old building?

A. It is an old building.

[Def.Ex.1,p.47]

Q. Well, let me bring you up a little further, or a little closer to date then. In 1971 a Mr. Mullineaux, and a Mr. Reneau from Chrysler Motors Corporation conducted a survey at your request concerning the operation of your dealership.

A. I don't remember. But I remember Mr. Mullineaux, and I assume that they did. I don't know for sure.

Q. Do you recall during that particular period of time that any criticism was made of your used car operation?

[Def.Ex.1,p.48]

A. I don't recall.

Q. Do you recall whether any discussion was had as to your financing operation of new cars?

A. Financing?

Q. Yeah. What is known as your F&I Income.

A. I don't recall that specific incident. But Chrysler Corporation felt that we weren't getting our pro-rata share of financing, and insurance, revenue.

Q. Let me ask you this, Mr. Payne: from 1968 forward or from 1969 forward your dealership showed a continually declining situation in terms of

working capital and net income. Surely there must have been sometime during that period of time when you had discussions with Chrysler Motor Corporation personnel about this situation.

A. Oh, yes. Yes, sir.

Q. All right. And do you recall generally or specifically what their observations were concerning this particular situation, the reason for it?

A. Well, the real reason for it, I mean I think the main reason for it was that they had opened Vestavia Plymouth and prior to that time 67 or 68 percent of our business came from over the mountain. And I think that was more responsible for it than everything else put

[Def.Ex.1,p.49]

together.

[Def.Ex.1,p.52]

Q. All right. What specifically,

forgetting about Chrysler Credit Corporation, what specifically did Chrysler Motors Corporation do wrong in terminating your franchise?

A. Well, just what I said. I mean they put me out of business, and cancelled my franchise.

Q. How did they put you out of business?

A. By putting in additional dealers; building the new buildings to operate in; hiring my employees; just any number of things. And I had been a Chrysler dealer for 29 years, and had never been on COD with them. I asked them to make me a capital loan and they refused to do it. And so they were in collusion with Chrysler Credit Corporation to put me out of business; which they did.

[Def.Ex.1,p.68]

Q. And after May 28, 1974, Mr.

Payne, did you have any intention to continue any automobile business as a Chrysler-Plymouth dealer?

A. After --

Q. After May 28, 1974?

A. Was that after we turned everything over to --

[Def.Ex.1,p.69]

Q. Yes, sir. To Chrysler Credit Corporation.

A. No. I wouldn't think so. I did not know the state of my health at that time. I was out of business. I had no financial connection.

[Def.Ex.1,p.76]

Q. Well, I understand that one of the problems that you had with the business was the fact that they allowed other people to sell Chrysler-Plymouth products in Birmingham.

A. Mr. Hairston, I maintain that they, and according to their Area

Manager, Mr. Oxburn, that they put four Chrysler dealers in Birmingham, and we just could not make it.

Q. So you say they had too many.

A. Yes, sir.

Q. And that was one of the reasons you closed up.

A. Yes, sir.

Q. And the other reason I believe you said is the fact that they curtailed your credit.

[Def.Ex.1,p.77]

A. Yes, sir.

Q. Now the Financial Statements that have been introduced in evidence here show the amount of money that you owed Chrysler Credit for financing your automobiles at various times, is that correct?

A. Yes, sir.

Q. I believe the first statement was 1968 -- 1967. At that time were you

doing business with Chrysler Credit?

A. Yes, sir.

Q. And it showed you owed them $682,000.00.

A. Yes, sir.

Q. And in 1974 the year you closed you owed them $640,000.00. In 1973 you owed them $789,000.00. Is that what you mean by your credit was curtailed?

A. Mr. Hairston, I have never complained about my credit being curtailed on new cars. The thing that put me out of business was when they curtailed my used car operation. And they never did -- I always had enough new cars to sell. That's not what I contend at all.

Q. Well, there wasn't any real dramatic change in the amount of credit that you were actually receiving from Chrysler Credit during the time you were dealing with them, was it?

[Def.Ex.1,p.78]

A. On new cars.

Q. On new; none?

A. I don't know. Right there at the last they might have cut it some. But that is not my argument at all. It is the used car. When they cut my used car credit that is what murdered me.

Q. What did they cut it from to what?

A. They cut it from $100,000.00 to 50. And they put in provisions they agreed they wouldn't do at the time I started doing business with them to where cars had to be sold within 90 days, or something like that.

[Def.Ex.1,p.79]

Q. Your working capital was steadily declining, were they not?

A. Yes, sir, yes, sir.

Q. The volume of your sales were not declining, were they not?

A. No.

Q. So you were still maintaining the same sales level but the cost of doing business was increasing and cutting down your profit picture, is that right?

A. Mr. Hairston, this has come up 20 times before. The thing that murdered me was that I would go and sell a new car and trade in a used car, and because I didn't have the line of credit to put it on my used car lot, I had to take it out and wholesale it. That is what murdered me.

Q. All right. And is that really what you are complaining of?

A. Yes, sir.

Q. You had to wholesale your used cars?

A. Yes, sir.

[Def.Ex.1,p.82]

Q. All right. Now when you say

curtailed the amount of credit on the used cars, you mean the total amount of money that you owed Chrysler Credit on the used cars?

A. They gave me a used car line of credit of $100,000.00, which meant that I could have $100,000.00 worth of used cars in stock. And they cut that to 50. And with the amount of business we were doing we couldn't operate with

[Def.Ex.1,p.83]

that. We had to wholesale the cars and we just couldn't get out enough profit.

Q. All right, now. Are these Dealer Financial Statements that have been introduced into evidence shows that during the period of 1967 you owed Wholesale Financial Liability on used cars and trucks $15,370.00. And in the January 1, 1974, statement through March 30, 1974, you owed Wholesale Finance Liability of $93,603.00. Is that what

you call curtailing your credit?

MR. REEVES: I object to the form of that question.

Q. Sir?

A. What I am talking about is they cut my wholesale line of credit from $100,000.00 to 50. And then forced me to reduce the used cars that I had in stock. Now I guess the reason we didn't have as many is because we were wholesaling.

BIRMINGHAM METRO FLEET COMPARISON

Year	Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
1971-1972	Dealer Fleet Selling Plan — Rule 1	$19,935.00	$2,205.00	$ 665.00	$ 850.00
1973	Fleet Purchase Program				
	Dealer Selling Allowance	17,775.00	1,575.00	950.00	450.00
	Dealer Incentive Allow.	7,690.00			
1974	Fleet Purchase Program				
	Dealer Selling Allowance	12,945.00	1,405.00	110.00	4,345.00
	Dealer Incentive Allow.	3,840.00			1,540.00
	TOTAL	$62,185.00	$5,185.00	$1,725.00	$7,185.00

[Def. Ex. 27]

BIRMINGHAM METRO INCENTIVE COMPARISON

Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
Winter Winners	$ -0-	$ 5,310.00	$ 3,015.00	$ 8,310.00
Big Dollar Payoff	23,850.00	1,931.25	3,900.00	12,025.00
Summer Sellout	3,040.00	5,660.00	5,925.00	12,800.00
Stock Eliminator	13,550.00	14,825.00	7,450.00	10,350.00
Winter Profit Days	-0-	-0-	4,450.00	6,525.00
Chrysler/Fury Profit	700.00	100.00	4,800.00	1,100.00
Sell Now	3,760.00	5,790.00	7,550.00	8,525.00
Summer Sweepstakes	-0-	25,695.00	18,540.00	26,095.00
Cash in With Chrysler	800.00	1,850.00	850.00	200.00
Clean Up & Cash In	3,400.00	6,800.00	4,000.00	3,400.00
Triple Pay	1,050.00	6,450.00	750.00	1,350.00
1972 5% Stock Rebate	9,689.20			
Twin Deal Dollars	200.00	200.00	-0-	5,000.00
Early Clean Up Bonus	-0-	-0-	17,600.00	16,325.00
1973 5% Stock Rebate	28,628.58	15,538.04	-0-	-0-
Cricket Profit Plus	200.00	100.00		
Super Earnings	4,670.00	-0-	OUT OF	10,850.00
Prime Rate on 8's	-0-	6,350.00	BUSINESS	10,250.00
"C" Body Bonus	5,400.00	800.00		1,000.00
"B" Body Bonus				
C/P Holiday Bonus		200.00		300.00
TOTAL	$98,937.78	$97,599.29	$78,830.00	$134,405.00

[Def. Ex. 28]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	NEW VEHICLES Sales			Average Gross Profit		Total Profit	
1971	Retail	Fleet	Total	Retail	Fleet	Gross	Net
J. Truett Payne Co.	562	161	723	390	208	$252,389	$ 72,215
Vestavia Chry.-Ply.	369	4*	373	385	na	143,492	48,788
Central Motors	467	16*	483	311	na	150,156	13,085
Roebuck Chry.-Ply.-Imp.	688	4*	692	335	na	232,054	17,779
1972							
J. Truett Payne Co.	576	185	761	425	242	289,579	104,700
Vestavia Chry.-Ply.	568	4*	572	435	na	248,651	113,118
Central Motors	585	17*	602	372	na	223,776	75,472
Roebuck Chry.-Ply.-Imp.	765	5*	770	342	na	263,485	20,455
1973							
J. Truett Payne Co.	567	210	777	435	312	312,008	110,853
Vestavia Chry.-Ply.	549	10*	559	361	na	201,641	23,164
Central Motors	399	20*	419	392	na	164,147	32,081
Roebuck Chry.-Ply.-Imp.	753	5*	758	380	na	287,787	36,248

*Dealer's financial statements do not reflect Fleet Sales. Fleet unit sales quantities obtained from the "Dealer Fleet Selling Plan Summary"

Period 1971 through 1973

	Total New Unit Sales	Total Fleet Unit Sales	Fleet Sales % of Total
J. Truett Payne Co.	2,261	547	24.2%
Vestavia Chry.-Ply.	1,504	18	1.1%
Central Motors	1,504	53	3.5%
Roebuck Chry.-Ply.-Imp.	2,220	14	.6%

[Def. Ex. 31 - Pg. 1 of 2 Pgs.]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	USED VEHICLES				
		Total Profit			
	Unit Sales	Average Gross Profit	Gross	Net	Net Earnings Before Taxes
1971					
J. Truett Payne Co.	803	$104	$ 83,461	$ 10,721	$(27,354)
Vestavia Chry.-Ply.	381	291	110,894	44,855	6,684
Central Motors	1,079	188	202,821	96,281	54,651
Roebuck Chry.-Ply.-Imp.	1,761	232	408,519	162,497	47,752
1972					
J. Truett Payne Co.	931	$123	$114,901	$ 24,708	$(8,206)
Vestavia Chry.-Ply.	753	155	116,854	39,153	4,519
Central Motors	954	165	157,042	64,291	93,052
Roebuck Chry.-Ply.-Imp.	1,914	246	470,748	173,001	36,378
1973					
J. Truett Payne Co.	768	$108	$ 82,788	$ 9,114	$(53,510)
Vestavia Chry.-Ply.	710	231	163,867	53,300	(80,234)
Central Motors	735	253	185,607	104,055	36,065
Roebuck Chry.-Ply.-Imp.	1,985	245	486,395	181,728	50,053

[Def. Ex. 31 - Pg. 2 of 2 Pgs.]

Defendant's Exhibit Thirty Six

Dealer	Incent.$	Units	$P.U.
1971			
Payne	40,440	562	$72
Central	27,726	467	$59
Roebuck	43,485	688	$63
Vestavia	20,290	369	$55
1972			
Payne	19,399	576	$34
Central	46,685	585	$80
Roebuck	47,195	765	$62
Vestavia	40,940	568	$72
1973			
Payne	29,029	567	$51
Central	15,838	399	$40
Roebuck	21,325	753	$28
Vestavia	17,600	549	$32

Defendant's Exhibit Thirty Seven

Average

Dealer	Incent.$	Units	$P.U.
Payne	88,868	1705	$52
Central	90,249	1451	$62
Roebuck	112,005	2206	$51
Vestavia	78,838	1486	$53

Defendant's Exhibit Thirty Nine

SERVICE PARTS

Year	Service/net	Pnus.
1970	46,630	$85
1971	34,033	$47
1972	28,348	$37
1973	24,088	$31

Year	Parts-net	Pnus.
1970	52,738	$96
1971	47,871	$66
1972	44,248	$58
1973	46,345	$60

Defendant's Exhibit Forty

USED CAR

	Net Profit	Units Sold	Puur.
	1970		
Payne	$35,300	694	$51
Cent.	114,300	1,060	$108
Roeb.	215,700	1,761	$122
Vest.	41,200	242	$170
	1971		
Payne	10,700	803	$13
Cent.	96,300	1,079	$89
Roeb.	162,500	1,761	$92
Vest.	44,900	381	$118

Net Profit		Units Sold	Puur.
1972			
Payne	24,700	931	$27
Cent.	64,300	954	$67
Roeb.	173,000	1,914	$90
Vest.	39,200	753	$52
1973			
Payne	$ 9,100	768	$12
Cent.	104,100	735	$142
Roeb.	181,700	1,985	$92
Vest.	53,300	710	$75

[Def. Ex. 41]

PROOF OF SERVICE

I, C. Lee Reeves, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of ....., 198..., I served copies of the above and foregoing Joint Appendix to the Supreme Court of the United States by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Hon. J. Fredric Ingram and Hon. J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorneys for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the ..... day of ....., 198....

C. Lee Reeves
Attorney for J. Truett Payne Company, Inc., Petitioner
2222 Arlington Avenue South
Birmingham, Alabama 35255
(205) 933-7111

Supreme Court, U. S.
FILED
JUL 12 1980
MICHAEL RODAK, JR., CLERK

79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

J. FREDERIC INGRAM
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Counsel for Respondent

Of Counsel:
THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-3000
J. ROSS FORMAN, III

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. The Decision By The Fifth Circuit Is Clearly Correct. 7

II. There Is No Conflict Of Decisions. 11

III. This Is Not A Case Of National Importance. 16

IV. The Alleged Amount Of The Discrimination Does Not Reflect Antitrust Injury In This Case. 17

CONCLUSION 20

CERTIFICATE OF SERVICE 21

APPENDIX

Defendant's Exhibit 27 ..... A-1

Defendant's Exhibit 28 ..... A-2

Defendant's Exhibit 31 ..... A-3

TABLE OF AUTHORITIES

Cases: *Pages*

American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951) 8, 12, 13

Baxter Imports, Inc. v. Saab-Scania of America, Inc., 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) 6, 8, 13, 16

Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947) 12, 14, 15, 16

Bruce's Juices v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd* 187 F.2d 919 (5th Cir. 1951) 15

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) 7, 11, 13, 14, 15

Dantzler v. Dictograph Products, Inc., 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963) 8, 9, 16

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) 12, 13, 14, 16, 17

Enterprise Industries, Inc., v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) 8, 16

F.T.C. v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) 10

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 9

Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) 12, 13, 14, 16

Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830 (3d Cir. 1961), *cert. denied*, 371 U.S. 829 (1962) 8, 16

TABLE OF AUTHORITIES – (Continued)

Pages

Grace v. E. J. Kozin Co., 538 F.2d 170 (7th Cir. 1976) 12, 14

Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979) 14

Harrelson v. Texaco, Inc., 486 F.2d 1400 (5th Cir. 1973) 8

Hasbrouck v. Texaco, Inc., 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980) 8, 13, 16

Interstate Commerce Commission v. United States, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933) 8, 10

Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) 14

Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961) 8

McCaskill v. Texaco, Inc., 351 F. Supp. 1332 (S.D. Ala. 1972) 8

Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949) 9

Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974) 8, 13

Perkins v. Standard Oil Co., 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) 7, 13, 15

Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974) 18

Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975) 8, 14

TABLE OF AUTHORITIES — (Continued)

Pages

Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243 (E.D. Pa. 1979) 8, 16

Tosa Chrysler-Plymouth v. Chrysler Motors Corp., 1974 Trade Cases ¶75,006 (E.D. Wis. 1974) 6

Uniroyal, Inc. v. Jetco Auto Service, Inc., 461 F. Supp. 350 (S.D.N.Y. 1978) 8, 16

Yoder Brothers, Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) 9

Youngston v. Tidewater Oil Co., 166 F. Supp. 146 (D. Or. 1958) 14

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979) 8, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether bare, self-serving, conclusory assertions of damage by a party, which are totally uncorroborated by other evidence, constitute sufficient evidence to prove that the petitioner suffered antitrust injury as a proximate consequence of respondent's retail sales incentive programs?

2. Whether self-serving, unsupported assumptions may form the basis for calculating antitrust damages?

3. Whether there is sufficient evidence in the record to establish the amount of the antitrust damage sustained by the petitioner as a proximate consequence of respondent's retail sales incentive programs?

STATEMENT OF THE CASE

This is a §2(a) Robinson-Patman, 15 U.S.C. §13(a), case wherein the petitioner, J. Truett Payne Company, Inc. (hereinafter "Payne"), charged that indirect price discrimination resulted from certain retail sales incentive programs offered by Chrysler Motors Corporation (hereinafter "Chrysler"), to all of its dealers during the period December 26, 1970 through May 28, 1974. Chrysler offered some 19 retail sales incentive programs during this time period. (Def. Ex. 28, at A-2 of the Appendix to this brief).

These programs offered all Chrysler dealers monetary payments based on their retail sales of Chrysler's products. (Tr. 139). Payments were dependent on accomplishments against wholesale and/or retail objectives which Chrysler computed, according to uniform procedures, based on each dealer's market potential and/or the dealer's prior sales. (Tr. 105-06, 447, 463, 464). As a result, each dealer had an opportunity to participate in each program, and receive equal payments for comparable performance. (Tr. 473).

Similar programs are currently in use and have been widely used by U.S. and foreign automobile manufacturers and distributors for a long period of time. Both Ford and General Motors, Chrysler's chief competitors, offered similar retail sales incentive programs during the same time periods as the Chrysler programs in issue here. (Tr. 475-476).

Chrysler also offered two other types of programs which were interconnected with the retail sales incentive programs in issue and which resulted in monetary payments to Payne and the other Chrysler dealers in the Birmingham, Alabama metropolitan area. These programs were: (1) the 5% stock rebate program for 1972 and 1973 model vehicles; and (2) the fleet sales incentive programs.

Under the 5% stock rebate program, the dealer could receive a refund from Chrysler of 5% of the factory price on each new prior year model vehicle in the dealer's inventory on the announcement day of the new model. However, the 5% stock rebate was only available to dealers not participating in the retail sales incentive program being run at the close of the model year. In both 1972 and 1973, Payne received the 5% stock rebate rather than participating in the alternative retail sales incentive program. (Tr. 168-171, 178-180; Plt. Exs. 48, at 21 of the Appendix to the Petition, and 51, at 24 of the Appendix to the Petition). The money received by each of the four Chrysler dealers located in the Birmingham area from the retail sales incentive programs and the 5% stock rebate is set forth in Defendant's Exhibit 28, at A-2 of the Appendix to this brief.

Under the fleet sales incentive programs, dealers received monetary payments for their fleet sales. A sale qualified as a fleet sale if it was made to a qualified fleet purchaser (one who generally purchased in large numbers), such as the Alabama Power Company. Since fleet sales were covered by separate programs, they did not count toward a dealer's sales objective under the retail sales incentive programs. If a dealer concentrated his sales effort on fleet sales, he would usually reduce his ability to participate in the retail incentive programs. (Tr. 77-78, 103-105). During the period involved in this case, Payne worked hard to make fleet sales, and over 24% of Payne's new car sales were fleet sales. (Tr. 104; Def. Ex. 31, at A-3 of the Appendix to this brief). Payne received $62,185 under the fleet sales incentive programs, while the next highest Chrysler dealer in the Birmingham area received only $7,185. The total fleet incentive money received by each Chrysler dealer in the Birmingham area is set forth in Defendant's Exhibit 27, at A-1 of the Appendix to this brief.

Over the period involved in this action, Payne received more money under the retail, fleet, and 5% stock rebate programs than any of the other dealers in the Birmingham area. These dealers received the following amounts under these programs:

Dealer	Total Received
Payne	$161,122.75
Roebuck	141,590.00
Central	102,784.29
Vestavia	80,555.00

(Def. Exs. 27, at A-1 of the Appendix to this brief, and 28, at A-2 of the Appendix to this brief).

At page 6 of the Petition, Payne asserts that there is evidence in this case that Payne was injured by the retail sales incentive programs by losing sales and by having to force business and over-allow on used-car trade-ins to make sales. Whether there was probative evidence of these facts is the exact question which was presented to the Court of Appeals for the Fifth Circuit. The Fifth Circuit reviewed over 1400 pages of record and could find no probative evidence of such.

To support its statement that it lost sales, forced business, and over-allowed on trade-ins, Payne cites pages 35, 65-69, 91-92, 94-95, and 126-127 of the transcript. These pages contain no such evidence other than Mr. J. Truett Payne's self-serving, conclusory allegations. No evidence was ever introduced to support and corroborate Mr. Payne's bare assertions. No evidence was introduced of the price being charged for new cars by Payne and the other Chrysler dealers in the Birmingham area while the retail sales incentive programs were in progress. No evidence was introduced of the number of sales Payne allegedly lost as a result of the programs. No evidence was introduced of the profits

Payne allegedly lost from having to force business and over-allow on trade-ins. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he lost sales because of the retail incentive programs. (Tr. 92-94). This, plus his testimony that the programs did not affect the price that the retail customer paid for a car (Tr. 85), demonstrates that the programs did not impair Payne's ability to compete in the Birmingham automobile market.

Besides Mr. Payne, the only other person to testify on behalf of Payne was Dr. George Ignatin, a professor of economics at the University of Alabama in Birmingham. Dr. Ignatin's testimony consisted in large part of explaining how he calculated what he contended to be the amount of the price discrimination effected by the retail sales incentive programs.[1] Dr. Ignatin claimed that Payne suffered price discrimination as a result of thirteen of the nineteen retail programs in a total amount of $81,248.94. (Tr. 191; Ptf. Exs. 37-54, at 10-27 of the Appendix to the Petition). Dr. Ignatin did not make any adjustment to this figure to reflect the times when Payne was the best performer under a program, or to reflect the money which Payne received under the fleet incentive programs.

At page 7 of the Petition, Payne sets forth the testimony of Dr. Ignatin concerning the *possible* effects which the re-

[1]Dr. Ignatin calculated what he contended to be the amount of the discrimination by dividing the incentive money received under a retail incentive program for sales of a particular car line by the number of such cars sold by the dealer during the program period. This gave Dr. Ignatin a figure which he called the "per unit rebate" for that car line. Dr. Ignatin performed this calculation for each car line on which separate incentive payments were made. He then compared the per unit rebate per car line which each dealer in the Birmingham area received under a program. If Payne did not receive the highest per unit rebate, Dr. Ignatin subtracted Payne's per unit rebate from the highest per unit rebate received by any dealer and multiplied the difference by the number of cars of that car line which Payne sold during that program period. Dr. Ignatin contended that this figure represented the amount of the price discrimination resulting from each program. (Tr. 228-229).

tail incentive programs could have on competition. However, there is absolutely no evidence in the record to show that any of these events actually happened or that the programs adversely affected the ability of any of the Chrysler dealers in the Birmingham automobile market to compete. In fact, Dr. Ignatin admitted that he had no evidence that any of the Chrysler dealers in the Birmingham area had discounted their retail price because of the incentive programs. (Tr. 255-256).

Throughout the Petition, Payne asserts that the competition among the four Chrysler dealers in the Birmingham area was exceedingly keen. There is no evidence in the record to support this claim except for Mr. Payne's bare assertion that competition among the dealers was *rough*. (Tr. 45). No evidence was introduced to corroborate Mr. Payne's allegation or to give any meaning to his characterization. Not even the minimal evidence of the price that Payne and the other Chrysler dealers were selling cars for was introduced.

In this case, the jury returned a verdict in favor of Payne for $111,247.48, and Chrysler appealed to the Fifth Circuit. Among the issues presented to the Fifth Circuit was whether the evidence was sufficient to prove: (1) that competition might be substantially lessened by the incentive programs;[2] and (2) that Payne had in fact suffered antitrust injury in an ascertainable amount as a proximate conse-

[2]Retail sales incentive programs identical in form to the programs involved in this case were considered in *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) and *Tosa Chrysler-Plymouth v. Chrysler Motors Corp.*, 1974 Trade Cases ¶75,006 (E.D. Wis. 1974). In both these cases the programs were challenged as violating §2(a) of Robinson-Patman, 15 U.S.C. §13(a), since the qualifying objectives for each dealer were different. The objectives, as in this case, were based on the individual dealer's market potential and/or his prior sales volume. In each case the court held that the necessary impact on competition had not been proven, since the assigned objectives were calculated in the same manner for each dealer and were therefore fair.

quence of the incentive programs. The Fifth Circuit did not reach the issue of whether there was sufficient evidence to establish that competition might be adversely affected since it found the evidence totally insufficient to prove that Payne suffered any antitrust injury, much less any ascertainable damage, as a proximate consequence of said programs.

ARGUMENT

I.

The Decision By The Fifth Circuit Is Clearly Correct.

It is well established law that in order for a private antitrust plaintiff to recover damages under §4 of the Clayton Act, 15 U.S.C. §15, said plaintiff must introduce substantial evidence that it suffered *antitrust* injury in some ascertainable amount as a proximate consequence of violations of the antitrust laws. This Court made this clear in its unanimous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). This rule is just as applicable in a §2(a) Robinson-Patman, 15 U.S.C. §13(a), action as in any other type of antitrust case. As this Court stated in *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969):

> "Before an injured party can recover damages under the Act [referring to §2(a) of Robinson-Patman, 15 U.S.C. §13(a)]; he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered."

It has long been the holding of most courts which have considered the question that the necessary injury to authorize recovery of damages for a §2(a) Robinson-Patman violation is not established by merely proving the amount of the price discrimination; and since *Perkins* and *Brunswick*,

this appears to be the rule to which all the circuits are moving. *Zwicker v. J. I. Case Co.*, 596 F.2d 305 (8th Cir. 1979); *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975); *Morning Pioneer, Inc. v. Bismark Tribune Co.*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974); *Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973), *aff'g sub nom. McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972); *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1961), *cert. denied*, 371 U.S. 829 (1962); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961); *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980); *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980); *Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F. Supp. 350 (S.D.N.Y. 1978). These cases hold that the antitrust injury suffered from illegal price discrimination is the profit lost by losing sales to the favored purchasers or from lowering one's price to match that of the favored purchaser.[3]

---

[3]That this is the proper measure of the injury suffered in a price discrimination suit was made clear by Mr. Justice Cardozo who stated in *Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933), a case which did not purport to construe the Robinson-Patman Act but which is clearly analogous:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .
>
> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When that rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the over-

At trial, Payne attempted to prove such impact on its business through self-serving, conclusory statements by Mr. Payne that the sales incentive programs caused him to lose sales (Tr. 65-67), to force business (Tr. 91-95, 126-127), and to over-allow on used-car trade-ins (Tr. 55, 711-712). There was absolutely no evidence introduced to corroborate any of these assertions by Mr. Payne. It is well established that uncorroborated, conclusory statements that one has been injured by violations of the antitrust laws are not sufficient to allow recovery of damages under §4 of the Clayton Act, 15 U.S.C. §15. *E.g., Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Dantzler v. Dictograph Products, Inc., supra*; *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Momand v. Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949).

The Fifth Circuit reviewed the over 1400 pages of record in this case and could not find any support for Mr. Payne's allegations of injury. In fact Mr. Payne discredited these assertions when he candidly admitted on cross-examination

---

charge without other evidence of loss . . . . But a different measure of recovery is applicable where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less. . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less. . . . *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*

. . . If by reason of the discrimination the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Id. at 389-91, 53 S.Ct. at 609-10 (emphasis added).

that he did not have any proof that he lost sales to any other Chrysler dealer because of the sales incentive programs (Tr. 92-94), and testified that he did not believe that the sales incentive programs had any impact on the price which the retail customer paid for Chrysler products (Tr. 85). Even Payne's expert admitted that he did not have any actual evidence that any of the other Chrysler dealers in the Birmingham area had discounted their retail price as a result of the sales incentive programs. (Tr. 255-256). Thus, the Fifth Circuit correctly reversed the jury verdict and directed judgment to be entered in favor of Chrysler.

On pages 16, 18 and 22 of the Petition, Payne argues that in this case it does not matter whether a favored dealer used its lower cost to try and attract additional sales or simply pocketed the extra profit to enhance its capital position. It is impossible to imagine how Payne's competitive position could have been injured if a favored dealer simply pocketed the savings and made no competitive use of it. The fact that such a dealer might be able to better withstand a weak economy is certainly not the type of injury with which §2(a) of the Robinson-Patman Act is concerned. If it was, there would be no need for the requirement in §2(a) of competitive injury because any price differential might enhance the capital position of the favored competitor.[4]

The Fifth Circuit's decision in no way infringes on this Court's decision in *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), as suggested by Payne in its Petition. In *Morton Salt*, this Court was only concerned with whether there was sufficient evidence to sup-

[4]When Payne talks of capital enhancement, it is merely trying to measure how much better off it would have been if it had paid the same price for new cars as the favored dealer. Such capital enhancement in no way measures how much worse off Payne was because competing dealers purchased cars for less, which is the test of injury in a price discrimination case. *Cf., Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933).

port an inference that the price differential *might* affect the ability of competitors to compete. The Court was not concerned with whether any of the disfavored competitors had been injured so as to authorize recovery of damages under §4 of the Clayton Act, 15 U.S.C. §15. The Fifth Circuit merely held that evidence which was sufficient to infer competitive injury under §2 (a) of Robinson-Patman was not necessarily sufficient to prove that said dealer's ability to compete was in fact injured so as to allow recovery under §4 of Clayton.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* this Court was presented with the precise question of whether proof of violation of an incipiency statute (like §2 (a) of Robinson-Patman) was sufficient to prove the necessary injury to authorize recovery of damages. This Court unanimously concluded that such proof was not necessarily sufficient. The Court stated:

> "Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated §7 [Clayton Act, 15 U.S.C. §18], since such proof establishes only that injury may result."

429 U.S. at 486, 97 S.Ct. at 696. Since Payne did not prove that its ability to compete was actually injured by the sales incentive programs, the Fifth Circuit's decision was clearly correct.

II.

There Is No Conflict Of Decisions.

In its Petition, Payne asserts that there is a conflict in the decisions as to whether actual antitrust injury must be

proven in a §2 (a) Robinson-Patman action in order to recover damages under §4 of the Clayton Act. Payne cites *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); *Grace v. E. J. Kozin Co.,* 538 F.2d 170 (7th Cir. 1976); *Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); and *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945), as standing for the proposition that once an illegal price discrimination is shown the disfavored purchaser is entitled to automatic damages in the amount of the price discrimination without being required to prove that its ability to compete was in fact impaired. Such a holding would unquestionably be in conflict with the rule in the Second, Third, Fourth, Fifth and Sixth Circuits; however, it is submitted that these cases do not reflect the present state of the law in regard to what proof is necessary to recover damages for a violation of §2 (a) of the Robinson-Patman Act.

The Eighth Circuit case of *Elizabeth Arden Sales Corp. v. Gus Blass Co., supra,* is a §2 (d) and §2 (e) Robinson-Patman, 15 U.S.C. §13 (d), (e), case. Since it was not necessary for the plaintiff to prove any adverse effect on competition to establish a violation of §2 (d) or §2 (e), it would seem reasonable that the plaintiff could recover the amount of the discrimination in allowances and services without having to prove anything else. However, in a §2 (a) action, where the plaintiff must prove that the price discrimination might impair its ability to compete, the plaintiff must go forward and prove that such an injury did in fact occur. This was the holding of the Eighth Circuit in *American Can Co. v. Russellville Canning Co.,* 191 F.2d 38 (8th Cir. 1951), a §2 (a) Robinson-Patman case decided six years after *Elizabeth Arden.*

In *Russellville,* the Eighth Circuit reversed the trial court's award of damages in the amount of the price discrimination, since no evidence was introduced to show that the plaintiff lost business or profits as a proximate consequence of said discrimination. The Eighth Circuit stated:

> "It is our understanding that, in order for a plaintiff to recover damages in a case such as this [§2 (a) Robinson-Patman], it is not enough to show that a plaintiff was guilty of price discriminations which might lessen or injure competition, but it is also necessary for the plaintiff to prove that the wrong done proximately resulted in ascertainable damages to its business and property."

Id. at 54. *In accord, Zwicker v. J. I. Case Co.,* 596 F.2d 305 (8th Cir. 1979); *Morning Pioneer, Inc., v. Bismarck Tribune Co.,* 493 F.2d 383 (8th Cir. 1974); *Baxter Imports, Inc., v. Saab-Scania of America, Inc.,* 1980-2 Trade Cases ¶63,367 (D. Minn. 1980). Thus, it appears clear that *Elizabeth Arden* does not state the law in the Eighth Circuit as to what must be proven to recover damages for a violation of §2 (a) of Robinson-Patman.

In the recent decision of *Hasbrouck v. Texaco, Inc.,* 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980), Judge Callister pointed out that *Fowler Manufacturing Co. v. Gorlick, supra,* is no longer the law in the Ninth Circuit. Judge Callister emphasized that *Fowler* was decided prior to this Court's decision in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* both of which are irreconcilable with the automatic damage rule announced in *Fowler.* Judge Callister also noted that since *Brunswick,* the Ninth Circuit has consistently held that damages do not automatically flow from proof of an antitrust violation, and that to recover damages the plaintiff must prove antitrust injury to its business or

property. *E.g., Handgards, Inc., v. Ethicon, Inc.,* 601 F.2d 986 (9th Cir. 1979); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979). Additionally, in *Rutledge v. Electric Hose & Rubber Co.,* 511 F.2d 668 (9th Cir. 1975), the Ninth Circuit indicated that *Fowler* is no longer the law by citing *Youngston v. Tidewater Oil Co.,* 166 F. Supp. 146 (D. Or. 1958), rather than *Fowler,* as stating the law as to what must be proven to recover damages for a violation of §2 (a) of the Robinson-Patman Act. In *Youngston,* the court stated:

> ". . . [T]o come within the reach of the provisions of the Robinson-Patman Act, one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both."

Id. at 147.

The Seventh Circuit decision in *Grace v. E. J. Kozin Co., supra,* does not indicate a conflict since it was a §2 (c) Robinson-Patman, 15 U.S.C. §13 (c), case. Like the situation in *Elizabeth Arden,* no competitive injury was required to prove a violation of §2 (c). Thus, in *Grace* the amount of the discriminatory allowance might well have represented the injury §2 (c) was designed to prevent. Chrysler is not aware of any Seventh Circuit case decided since this Court's *Brunswick* decision which discusses what must be proven to recover damages for a violation of §2 (a) of Robinson-Patman. However, there is no reason to think that the rule in the Seventh Circuit will be different from that of the other circuits.

The statement in *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947) (a 5 to 4 decision) that, in the absence of extraordinary circumstances, the amount of damages recoverable for illegal price

discrimination would be the amount of the discrimination, does not necessarily indicate a conflict with the Fifth Circuit's decision. This statement is purely dictum in response to an abstract argument by the petitioner that price discrimination ought to be a complete defense to an action to recover the cost of the product purchased, since it would be too difficult to prove consequential damages arising from the discrimination. Moreover, a reading of *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd* 187 F.2d 919 (5th Cir. 1951) suggests that there was evidence in the case before the Supreme Court that the price discrimination did result in lower prices by the favored competitors. Thus, the amount of the discrimination might very well have reflected the antitrust injury suffered. It would seem logical that the *extraordinary circumstances* which the Supreme Court had in mind in *Bruce's Juices* was the situation where no correlation between the price discrimination and the injury suffered was proven.

Further, this Court's decision in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* makes it clear that a plaintiff is not entitled to recover automatic damages in the amount of the price discrimination simply by proving a violation of §2 (a) of Robinson-Patman. The plaintiff must go further and prove that antitrust injury did in fact occur. As stated by this Court in *Brunswick*:

> "The plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' "

429 U.S. at 489, 97 S.Ct. at 697.

Thus, in a §2 (a) Robinson-Patman case, the plaintiff must prove antitrust injury by showing that the favored competitor, by virtue of his lower cost, lowered his retail price or took other measures to attract sales, so that the plaintiff either lost sales or lost profits by matching this competition. This is the rule which the recent §2 (a) Robinson-Patman cases have been following. *E.g., Baxter Imports, Inc. v. Saab-Scania of America, Inc., supra; Hasbrouck v. Texaco, Inc., supra; Sweeney & Sons v. Texaco, Inc., supra; Uniroyal, Inc., v. Jetco Auto Service, Inc., supra.*

III.

This Is Not A Case Of National Importance.

The questions raised by the Petition have been presented to this Court on numerous occasions, and the Court has denied *certiorari* in each instance. *See, Fowler Manufacturing Co. v. Gorlick, supra; Dantzler v. Dictograph Products, Inc., supra; Freedman v. Philadelphia Terminals Auction Co., supra; Enterprise Industries, Inc., v. Texas Co., supra; Elizabeth Arden Sales Corp. v. Gus Blass Co., supra.* The obvious reason for the denial of *certiorari* is that resolution of the question of what proof is necessary to show antitrust injury, and what damages may be recovered for violation of the Robinson-Patman Act, will vary depending on the facts of each individual case. In some instances, the amount of the price discrimination might very well reflect the antitrust injury suffered by the plaintiff. However, in other instances, the amount of the price discrimination may not accurately reflect the injury and damages sustained by the disfavored competitor. Even the cases which Payne cites as supporting its automatic damage theory recognize this. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); *Fowler Manufacturing*

Co. v. Gorlick, supra at 1252 n.3; *Elizabeth Arden Sales Corp. v. Gus Blass Co., supra* at 996.

In this case, the Fifth Circuit merely held that what Payne claimed to be the amount of the price discrimination did not accurately reflect the antitrust injury which would be expected to flow from the sales incentive programs. Since Payne did not present any evidence of antitrust injury or the amount thereof, the Fifth Circuit correctly reversed the jury verdict and directed judgment be entered in favor of Chrysler. In essence, the Fifth Circuit's opinion is just a sufficiency of the evidence decision which does not warrant the attention of this Court. There is no pressing need for this Court to undertake the same review of over 1400 pages of record as performed by the Fifth Circuit to see if there was sufficient evidence to allow the case to go to the jury.

IV.

The Alleged Amount Of The Discrimination Does Not Reflect Antitrust Injury In This Case.

What Payne contends represents the amount of the price discrimination in no way reflects the antitrust injury which the sales incentive programs could have inflicted. This is self-evident from the manner in which Payne computed what it contends to be the amount of the discrimination. Payne determined this amount by calculating what it called the "rebate per unit sold" received by all Chrysler dealers in the Birmingham area under each retail incentive program. When Payne did not receive the highest rebate per unit, Payne took the difference between what it received per unit and the highest rebate per unit received by any of the other Chrysler dealers, and multiplied this difference by the number of such cars sold by Payne during the pro-

gram period. This calculation resulted in a total alleged discrimination of $81,248.94.[5]

The basic flaw with this method of calculating the effect of the discrimination is that it assumes that the more cars Payne sold during a program, the worse it was injured. Such an assumption is unrealistic since the more cars Payne sold, the less it could have been injured by the retail incentive programs. This is incontrovertible since over the period involved in this case, Payne averaged the highest gross profit on new retail sales of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, at A-3 of the Appendix to this brief). Payne's method of calculating the amount of the discrimination is almost identical to the damage calculations made in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974). The Third Circuit resoundingly rejected such damage calculations because they in no way reflected the injury which the antitrust violation could have inflicted.

Further, it is important to note that Payne did not make any adjustments to the claimed amount of the discrimination to reflect the occasions when Payne received the highest rebate per unit[6] or to reflect the money received under

[5]This calculation does not accurately reflect the amount of the price discrimination. In this case, Payne contended that the retail sales incentive programs were discriminatory because their qualification objectives were too high. (Tr. 57-58, 84-85, 102). Thus, the real amount of the discrimination would be the difference between what Payne actually received from participation in the retail incentive programs and what it would have received if its objectives had been non-discriminatory. Payne did not present any evidence of what this figure would have been.

[6]The 1971 Big Dollar Payoff is a good example of how Payne inflated his damage calculation by not making a credit adjustment when it received the highest per unit rebate. According to Payne's calculation it received $28.43 per unit for sales of Valiants while Roebuck Chrysler-Plymouth received $54.03 per unit. Since Payne sold 51 Valiants during the program, Payne contends that it suffered a discrimination of $1,305.65. However, on sales of all other car lines, which constituted most of the sales under the program, Payne received a per unit rebate of $107.98 com-

the fleet incentive programs. If Payne had deducted such payments from the claimed amount of the discrimination, Payne would not have had any significant amount of discrimination to complain about even under its erroneous method of calculating the amount of the discrimination.

Since the alleged discrimination of $81,248.94 in no way reflects the antitrust injury which one would expect to flow from the sales incentive programs, Payne's arguments in the Petition must fall.

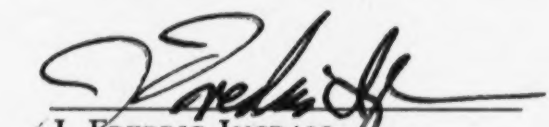
---

pared to $35.59 per unit for the next highest dealer Roebuck. Obviously, Payne was not injured by the program; nevertheless, Payne concluded that it suffered discrimination of $1,305.65 under the program. (Plt. Ex. 39, at 12 of the Appendix to the Petition).

CONCLUSION

This case does not present any issues of substantial importance to merit consideration by this Court. This is purely a sufficiency of the evidence case in which the Fifth Circuit correctly applied well established principles of law. For these reasons and the reasons set forth above, it is respectfully submitted that the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,



J. FREDRIC INGRAM
Attorney for Respondent,
Chrysler Motors Corporation.
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-3000

July 11, 1980

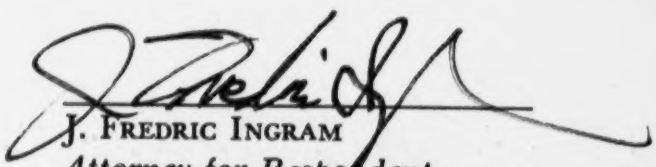
Of Counsel:
THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-3000
J. ROSS FORMAN, III

CERTIFICATE OF SERVICE

I, J. Fredric Ingram, attorney for Respondent, Chrysler Motors Corporation, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of July, 1980, I served three copies of the foregoing Brief In Opposition, together with the appendices thereto, by placing the same in the United States mail, with first class postage prepaid, in a duly addressed envelope, to Hon. Morris K. Sirote and Hon. C. Lee Reeves, 2222 Arlington Avenue, South, Birmingham, Alabama 35205, attorneys for Petitioner, J. Truett Payne Company, Inc.

It is further certified that all parties required to be served have been served.

This the 11th day of July, 1980.



J. FREDRIC INGRAM
Attorney for Respondent,
Chrysler Motors Corporation.
1600 Bank For Savings Building
Birmingham, Alabama 35203
(205) 251-3000

APPENDIX

BIRMINGHAM METRO FLEET COMPARISON

Year	Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
1971-1972	Dealer Fleet Selling Plan — Rule 1	$19,935.00	$2,205.00	$ 665.00	$ 850.00
1973	Fleet Purchase Program				
	Dealer Selling Allowance	17,775.00	1,575.00	950.00	450.00
	Dealer Incentive Allow.	7,690.00			
1974	Fleet Purchase Program				
	Dealer Selling Allowance	12,945.00	1,405.00	110.00	4,345.00
	Dealer Incentive Allow.	3,840.00			1,540.00
	TOTAL	$62,185.00	$5,185.00	$1,725.00	$7,185.00

[Def. Ex. 27]

BIRMINGHAM METRO INCENTIVE COMPARISON

Program	J. Truett Payne Co., Inc. 61-07178	Central Mtrs., Inc. 61-61635	Hall Mtr. Co. Vestavia C/P 61-62077	Roebuck C/P/IMP. 61-62694
Winter Winners	$ -0-	$ 5,310.00	$ 3,015.00	$ 8,310.00
Big Dollar Payoff	23,850.00	1,931.25	3,900.00	12,025.00
Summer Sellout	3,040.00	5,660.00	5,925.00	12,800.00
Stock Eliminator	13,550.00	14,825.00	7,450.00	10,350.00
Winter Profit Days	-0-	-0-	4,450.00	6,525.00
Chrysler/Fury Profit	700.00	100.00	4,800.00	1,100.00
Sell Now	3,760.00	5,790.00	7,550.00	8,525.00
Summer Sweepstakes	-0-	25,695.00	18,540.00	26,095.00
Cash in With Chrysler	800.00	1,850.00	850.00	200.00
Clean Up & Cash In	3,400.00	6,800.00	4,000.00	3,400.00
Triple Pay	1,050.00	6,450.00	750.00	1,350.00
1972 5% Stock Rebate	9,689.20			
Twin Deal Dollars	200.00	200.00	-0-	5,000.00
Early Clean Up Bonus	-0-	-0-	17,600.00	16,325.00
1973 5% Stock Rebate	28,628.58	15,538.04	-0-	-0-
Cricket Profit Plus	200.00	100.00		
Super Earnings	4,670.00	-0-	OUT OF	10,850.00
Prime Rate on 8's	-0-	6,350.00	BUSINESS	10,250.00
"C" Body Bonus	5,400.00	800.00		1,000.00
"B" Body Bonus				
C/P Holiday Bonus		200.00		300.00
TOTAL	$98,937.78	$97,599.29	$78,830.00	$134,405.00

[Def. Ex. 28]

BIRMINGHAM METRO SALES COMPARISON Period 1971 - 1973

	NEW VEHICLES Sales			Average Gross Profit		Total Profit	
1971	Retail	Fleet	Total	Retail	Fleet	Gross	Net
J. Truett Payne Co.	562	161	723	390	208	$252,389	$ 72,215
Vestavia Chry.-Ply.	369	4*	373	385	na	143,492	48,788
Central Motors	467	16*	483	311	na	150,156	13,085
Roebuck Chry.-Ply.-Imp.	688	4*	692	335	na	232,054	17,779
1972							
J. Truett Payne Co.	576	185	761	425	242	289,579	104,700
Vestavia Chry.-Ply.	568	4*	572	435	na	248,651	113,118
Central Motors	585	17*	602	372	na	223,776	75,472
Roebuck Chry.-Ply.-Imp.	765	5*	770	342	na	263,485	20,455
1973							
J. Truett Payne Co.	567	210	777	435	312	312,008	110,853
Vestavia Chry.-Ply.	549	10*	559	361	na	201,641	23,164
Central Motors	399	20*	419	392	na	164,147	32,081
Roebuck Chry.-Ply.-Imp.	753	5*	758	380	na	287,787	36,248

*Dealer's financial statements do not reflect Fleet Sales. Fleet unit sales quantities obtained from the "Dealer Fleet Selling Plan Summary"

Period 1971 through 1973

	Total New Unit Sales	Total Fleet Unit Sales	Fleet Sales % of Total
J. Truett Payne Co.	2,261	547	24.2%
Vestavia Chry.-Ply.	1,504	18	1.1%
Central Motors	1,504	53	3.5%
Roebuck Chry.-Ply.-Imp.	2,220	14	.6%

[Def. Ex. 31]

FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

C. LEE REEVES
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111
Counsel for Petitioner

Of Counsel:
SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Circuit's requirement that a disfavored automobile dealer must affirmatively show actual lost sales to favored competitors as the only means of proving the fact of actual damage, rather than permitting the jury's appropriate inference of damage to stand, impose an inflated standard for proving injury in a price discrimination case thereby effectively preventing enforcement of the Act by private attorneys general?

2. In a market where keen price competition exists, does an automobile manufacturer's substantial price discrimination, totaling $81,248.94, against one of its dealers during

a three and one-half year period, permit an inference of actual damage to the disfavored dealer so that a jury's verdict finding such damage should be sustained?

3. Does the proof of damage to competition under § 2(a) of the Robinson-Patman Act prove damage to the plaintiff under § 4 of the Clayton Act?

4. When there is both an inference of actual antitrust injury and direct proof of actual antitrust injury to the disfavored retail automobile dealer as a result of the automobile manufacturer's substantial price discriminations, is the amount of price discrimination a proper minimum amount of damages to the dealer under § 4 of the Clayton Act?

5. Did the Fifth Circuit commit plain error by holding that there was insufficient evidence to show either the fact of antitrust damage or the amount of that damage to J. Truett Payne Company, Inc.?

PARTIES INVOLVED BELOW

Chrysler Credit Corporation, plaintiff, sued J. Truett Payne Company, Inc., J. Truett Payne, and Blanche Payne on a promissory note and guaranty agreement. J. Truett Payne Company, Inc. filed a claim against Chrysler Credit Corporation and Chrysler Motors Corporation, as an additional party defendant. This case is the Robinson-Patman Act claim filed by J. Truett Payne Company, Inc. against the additional party defendant, Chrysler Motors Corporation, which the trial judge severed from the original claim made by Chrysler Credit.

TABLE OF CONTENTS

Page No.

Questions Presented for Review i
Parties Involved Below ii
Table of Contents iii
Table of Authorities iv
Citations to the Opinions and Judgments Below 1
Statement of Jurisdiction 1
Statutes Involved 1
Statement of the Case 2
Summary of the Argument 9
Argument 11
I. Proof Of Injury To Competition Under Section 2 (a) Of The Robinson-Patman Act Permits An Inference Of Injury Under Section 4 Of The Clayton Act 11
(a) The Substantial Price Discrimination Against Payne Allowed the Jury to Infer Injury to Payne's Business 12
(b) The Inflated Standard of Proving the Fact of Damage Is Contrary to the Policy of Enforcing the Antitrust Laws 17
(c) There Was Actual and Direct Proof of Antitrust Injury 21
(d) Payne's Damage Was the Type of Damage That the Antitrust Laws Were Designed to Remedy 27
II. The Amount of Damage Was Proved 28
(a) The Amount of Price Discrimination Is the Minimum Damage in Robinson-Patman Act Cases 28
(b) Price Overcharge Is the Minimum Amount of Damage in Sherman Act Cases 33
(c) The Amount of the Price Discrimination Is A Practical Measure of Damages 35
(d) Damages Awarded In This Case Were Appropriate Under Any Standard 36
Conclusion 40
Certificate of Service 41

TABLE OF AUTHORITIES

Table Of Cases

Page

American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) 15, 29, 32

Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163 (7th Cir. 1972) 9, 16

Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co., 202 F. Supp. 514 (D.C. Mo. 1959) 29

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 19, 36

Bruce's Juices v. American Can Co., 330 U.S. 743 (1947) 9, 10, 12, 14, 16, 17, 20, 29, 30, 31, 32

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 10, 27

Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133 (5th Cir. 1979) 1, 7, 11

City of Mishowaka v. American Electrical Power Co., 465 F. Supp. 1320 (N.D. Ind. 1979) 34, 35

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 12

Dantzler v. Dictograph Products, Inc., 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963) 29

E. Edelmann and Co. v. F.T.C., 329 F.2d 152 (7th Cir. 1956) 15

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) 24, 29

Table Of Cases — (Continued)

Page

Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965 (1957) 29, 36

F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948) 9, 10, 12, 13, 14, 16, 17, 19, 25, 28

Foremost Dairies v. F.T.C., 348 F.2d 674 (5th Cir. 1965) 14, 15, 16

Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) 9, 12, 24, 29, 32, 33

Gough v. Rossmoor Corp., 505 F.2d 381 (9th Cir.), *cert. denied*, 440 U.S. 936 (1979) 25

Grace v. E. J. Kozin Co., 538 F.2d 170 (7th Cir. 1976) 17, 29

Hanover Shoe v. United Shoe Machinery, 392 U.S. 481 (1968) 10, 11, 18, 19, 28, 33, 34, 35, 36, 39

Hanson v. Pittsburg Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 14

ICC v. United States, 289 U.S. 385 (1933) 35

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 10, 11, 18, 19, 35, 36

Janich Bros., Inc. v. American Distilling Company, 570 F.2d 848 (9th Cir. 1977) 25

John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24 (2d Cir. 1978) 25

Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961) 29

Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979) 36

Table Of Cases — (Continued)

Page

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969) 16, 23

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 16

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 14, 25

Samuel H. Moss, Inc. v. F.T.C., 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945) 25

State Wholesale Groceries v. Great Atlantic & Pacific Tea Co., 202 F. Supp. 768 (D.C. Ill. 1961) 29

Terrell v. Household Good Carriers' Bureau, 494 F.2d 16 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987 (1974) 36

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 9, 12, 13, 36

Statutes and Other Authorities

Barber, *The Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 Geo. Wash. L. Rev. 181 (1960) 20, 21

J. McCord, *Commentaries on the Robinson-Patman Act 20* (Practicing Law Institute 1969) 19

Kinter, *A Robinson-Patman Primer 3* (The MacMillan Company 1970) 18

Price Discrimination and Related Problems Under the Robinson-Patman Act (Joint Comm. on Cont. Leg. Ed., Amer. Law Inst./Amer. Bar Ass'n, 2d, rev. ed. [1959]) 19

United States Law Week, Vol. 16, No. 36, pp. 3276-77 (March 16, 1948) 17

Clayton Act § 4, 15 U.S.C. § 15 ..... 2, 10, 14, 19, 23

Robinson-Patman Act § 2 (a), 15 U.S.C. § 13 ..... 1, 2, 9, 13, 19

Robinson-Patman Act § 2 (b), 15 U.S.C. § 13 ..... 2, 24

28 U.S.C. § 1254 (1) 1

CITATION TO THE OPINIONS AND JUDGMENTS BELOW

Judgment was entered in favor of J. Truett Payne Company, Inc. (hereinafter "Payne") and against Chrysler Motors Corporation (hereinafter "Chrysler") in the United States District Court for the Northern District of Alabama, Southern Division, in the amount of $373,742.44 (App. to Pet. for Cert. 8).

The Fifth Circuit Court of Appeals reversed the judgment of the District Court in *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979). (App. 2-10). Rehearing was denied on March 18, 1980. 614 F.2d 1298 (App. to Pet. for Cert. 7).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case was entered on December 7, 1979. Petitioner's *Application For Rehearing, or In the Alternative Rehearing En Banc,* was denied on March 18, 1980. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254 (1), by filing a Petition for Writ of Certiorari within 90 days of the Fifth Circuit's order denying a rehearing. This Court granted the Writ of Certiorari to the Fifth Circuit on October 6, 1980.

STATUTES INVOLVED

15 U.S.C. § 13, otherwise known as § 2 of the Robinson-Patman Act, in pertinent part reads as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the pur-

> chases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowing receives the benefits of such discrimination, or with customers of either of them. . . .
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, states as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This price discrimination case was tried in the United States District Court for the Northern District of Alabama, Southern Division. The jury's verdict of $111,247.78 in favor of Payne was trebled and an attorney's fee added, resulting in a judgment against Chrysler in the amount of $373,742.44. Chrysler's Motion for Judgment Notwith-

standing the Verdict or for a New Trial was denied. Chrysler appealed.

The Fifth Circuit held that Payne had presented insufficient proof of injury and insufficient proof of the amount of damages. The Fifth Circuit reversed and directed entry of judgment for Chrysler, but did not disturb the jury's finding that Chrysler violated the Robinson-Patman Act.

Because the Fifth Circuit opined that there was a dearth of substantial evidence showing causation and amount of damage, the facts are set out in some detail to show that there was a substantial amount of direct proof supporting the jury's verdict.

The evidence in the trial showed as follows: Payne had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (TR. 40). Prior to and during a three and one-half year period from approximately December 1970 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers in a market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers[1] competing with Payne (TR. 45-46; 124). Chrysler had been paying rebates since the early 1960's to Payne and other competing dealers on various cars they purchased from Chrysler. (TR. 444). These rebates were paid under the terms of rebate or incentive programs which Chrysler formulated during that period.

During the time frame permitted by the statute of limitations, December, 1970 through May, 1974, Chrysler cre-

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth (sometimes known as Car Center), Central Motors, and Bessemer Chrysler-Plymouth (sometimes known as Hall Motor Company, and later changed in 1972 to Vestavia Chrysler-Plymouth).

ated approximately sixteen rebate or incentive programs,[2] each lasting several months, under which it would make rebate payments on the new cars it sold to the four competing Chrysler-Plymouth dealers in the Birmingham, Alabama market area. Chrysler unilaterally assigned each dealer a separate and different quota for wholesale purchases and/or retail sales which each dealer had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car during a rebate program reduced the price of the new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (TR. 56; 62; 95; 124-125; 256; 617-618; App. 32-33; 92-93).

In almost every rebate program, Chrysler assigned Payne a higher quota than its competing dealers, and Payne had to meet that higher quota in order to receive a rebate payment. In other words, Payne had to either purchase more new cars from Chrysler or sell more new cars in order to obtain a rebate payment from Chrysler reducing the costs of those cars. Because it could not meet the high quotas, Payne actually paid more for almost every car involved in the rebate programs compared to the other dealers. The total price discrimination against Payne during this three and one-half year period of the programs was $81,248.94. As a result of the higher quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers. (R. 65-67; 68-69). Payne could not meet

[2]All rebate programs in this case involved only retail sales and were introduced as Pl. Ex. 1-16 (TR. 49-51). Fleet sales are not involved in this suit. Payne does not complain that the two end-of-the-year "stock rebate" programs were discriminatory since they did not set quotas for any dealer as a condition to participating. To the contrary, those end of the year stock rebate programs were the only programs where quotas were not set differently for each dealer, and hence they were totally non-discriminatory and did not result in any price discrimination.

the low price that the other Chrysler dealers were offering in the Birmingham market. (TR. 91, 124). These rebate programs, which had been in use since the 1960's, were run almost continuously so that almost every car that was sold at retail by Payne and its competitors from November 1970 through May 1974 was covered by a rebate program.[3]

Because of the disadvantage at which the rebate programs put Payne, Payne ended up forcing business in order to make a sale, and Payne still lost customers and sales. (R. 65-69; 91-92; 94-95; 126-127; App. 34-37; 95). In order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer. (TR. 55; 711-712; App. 223-224). Payne had to sell at a smaller profit than it could afford to sell and still compete effectively, and generally it still could not meet the lower prices of the other dealers. (TR. 91; 124; App. 92). Payne was losing customers and sales because of the rebate programs. (TR. 65-67; 68-69; 91-92; 94-95; 126-127; App. 36-37; 52). For the last five years of its operations, Payne lost money, primarily because of its losses in the used car operations. (TR. 538-539).

Dr. George Ignatin, an economist at the University of Alabama, testified that the rebates per car paid by Chrysler to each dealer under those rebate programs reduced the dealer's cost on that car. (TR. 138; App. 96-97). Chrysler's expert witnesses also testified that the rebate reduced the dealer's cost of the cars. (TR. 527; 618). Dr. Ignatin was thoroughly familiar with the car market in Birmingham

[3]*See* Pl. Ex. 1-16, and the dates during which the programs were running. In examining these Exhibits which contain the results of the four dealers' participation in each of the rebate programs, it is evident that the dealers received rebates on thousands of cars that they sold. Def. Ex. 31 (TR. 539; App. 268) shows the retail sales made by the various dealers in 1971, 1972 and 1973. In comparing the total number of new sales made (from Def. Ex. 31) with the dealers' participation in the rebate programs (in Pl. Ex. 1-16), it is obvious that there were rebates paid on almost every single car sold at retail by the various dealers.

and did several studies about the Birmingham market (TR. 201; 695). Chrysler's rebate programs reduced competition in the Birmingham market between Chrysler dealers and had an adverse effect on competition (TR. 222; App. 130-131). As a result of the rebate payment to the competing dealer, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (TR. 203; 256-257; App. 130-131). The rebates actually injured Payne's business by causing it to lose profits it would have otherwise made had Chrysler's prices been equal and by diminishing its ability to compete for sales. (TR. 256-258; App. 135-138).

The effects of the price discrimination are most evident when compared to the tight profit margins. Profit margins on used cars, which were a part of the price components of a dealer's new retail sales, were very tight. Gross profit per used car varied in 1971 from $104 per car for Payne to $291 per car for Vestavia; in 1972, from $123 for Payne to $246 for Roebuck; in 1973, from $108 for Payne to $253 for Central (Def. Ex. 31; TR. 539; App. 269). The net profits per used car in 1971 ranged from $13 for Payne to $118 for Vestavia; in 1972, from $27 for Payne to $90 for Roebuck; in 1973, from $12 for Payne to $142 for Central (Def. Ex. 31 and 41; TR. 539; 613; App. 269). Rebates, on the other hand, were sometimes as much as $300 per car. See, for example, Pl. Ex. 52; TR. 222-223; App. 243.

It is well known in the automobile industry that all dealers discount off list price in setting the retail price of the car. Because of these rebate payments, Payne could not discount its cars from list price as much as it could have if it had received the same rebate per car as the other dealers competing with Payne at that time. Other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne

received an equal rebate per car from Chrysler. The effect of the discrimination against Payne under the Chrysler rebate programs was to maintain a retail price to a consumer at artificially high levels. Thus, by reducing the actual competition in the market the rebates had an adverse effect on competition and on the consuming public (TR. 203-204; 222; 255; App. 130-131; 134-135).

The price discrimination from the rebate programs was one of the causes[4] of Payne's going out of business in May, 1974 (TR. 68-69; 100; 705-706; App. 65; 222-223). Without those price discriminations, Payne's expenses would have been less, and Payne could have stayed in business. Payne's business as of May 1974, when it was forced out of business, was valued at between $50,000 and $170,000. (TR. 75-76; 115-116; 210-218).

An expert economist reviewed and analyzed each of the rebate programs. He calculated for each program how much more money the favored dealers received on a per car basis than did Payne under that same program, as well as the amount of discrimination resulting to Payne in each program (*See*, Pl. Ex. 37-53; TR. 140-184; 222-223; App. 228-244). In almost every instance, a different rebate per car was paid to each dealer on the same model car for which each qualified. In almost every instance, Payne was disfa-

---

[4]In its opinion, the Fifth Circuit stated that the economist, Dr. Ignatin, prefaced his testimony that the rebate programs were a cause of Payne's going out of business by stating that "I really can't tell you without having you know—it's a hypothetical question." 607 F.2d at 1135, n. 4. This is a totally inaccurate recounting of what Dr. Ignatin said. Dr. Ignatin made that statement in response to a question by the attorney for Chrysler as to whether or not, in Dr. Ignatin's opinion, a company like Chrysler could devise an incentive program that paid a dealer monies based on that dealer's strength potential compared to other dealers. (*See*, TR. 705-706). That statement by Dr. Ignatin did not in anyway contradict, or even relate to, his opinion that the rebate programs, as applied to Payne, were discriminatory and caused Payne to go out of business.

vored and damaged[5] since it did not receive as great a rebate per car as did the more favored dealers in that program. During the three and one-half year period in issue, the total amount of price discrimination against Payne on the automobiles it sold during this period was $81,248.94 (TR. 191). Of the sixteen programs analyzed, only three were non-discriminatory to Payne. Two of these programs did not have different purchase or sales quotas established for the various dealers, but gave rebates to all dealers equally on a per car basis. Only in one rebate program where different quotas were established for each dealer was Payne not disfavored. Payne did not claim any damages resulting to it from those three programs.[6]

---

[5]Payne complained of discrimination in thirteen out of the sixteen programs:

Winter Winers, (Pl. Ex. 1, 37 and 38; App. 228-229); 1971 Big Dollar Payoff, (Pl. Ex. 2, 39, and 40; App 230-231); Summer Sellout (Pl. Ex. 3 and 41; App. 232); Winter Profit Days (Pl. Ex. 4 and 42; App. 233); Chrysler-Plymouth Sell Now (Pl. Ex. 7 and 44; App. 235); Chrysler-Plymouth/Fury Profit Program (Pl. Ex. 6 and 45; App. 236); Cash In With Chrysler (Pl. Ex. 8 and 46; App. 237); Clean Up and Cash In (Pl. Ex. 9 and 47; App. 238); 1972 Summer Sweepstakes (Pl. Ex. 10 and 48; App. 239); Chrysler-Plymouth Triple Pay (Pl. Ex. 11 and 49; App. 240); Fury-Chrysler-Imperial "Twin Deal Dollars" (Pl. Ex. 12 and 50; App. 241); Super Earnings (Pl. Ex. 14 and 52; App. 243); Prime Rate on Eights (Pl. Ex. 16 and 53; App. 244). See generally, TR. 140-185; 222-223.

The other rebate programs consisted of two types: (1) non-discriminatory stock rebate programs (Pl. Ex. 5 and 13), and (2) a program in which Payne was not discriminated against, but did have to satisfy quotas before participation (Pl. Ex. 15). In the 1971 Stock Eliminator program (Pl. Ex. 5 and 43; App. 234) and the Chrysler-Plymouth Early Cleanup Bonus" (Pl. Ex. 13 and 51; App. 242), Chrysler offered a non-discriminatory rebate to all dealers without setting different quotas for each dealer. Payne did not claim any damages from those programs because they were not discriminatory. In "C" Body Bonus, (Pl. Ex. 15 and 54; App. 245), Payne claimed no damages and was not discriminated against even though discriminatory quotas were assigned.

[6]*See,* the "1971 Stock Eliminator Program", (App. 234), "Chrysler-Plymouth Early Clean-up Bonus," (App. 242), and G-Body Bonus" (App. 245) mentioned the previous footnote.

SUMMARY OF ARGUMENT

The plaintiff in a private price discrimination action must only prove sufficient price discrimination from which a jury can infer injury to competition. This inference of injury to competition is regularly permitted in public cases enforcing § 2 (a) of the Robinson-Patman Act. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948). An injury to competition is inferred where there is a substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price. When a plaintiff shows injury to competition, he simultaneously shows injury to his business or property for purposes of recovering damages under § 4 of the Clayton Act.

Section 4 of the Clayton Act requires that a plaintiff prove a violation of the antitrust laws, a cognizable injury attributable to a violation of the antitrust laws and some indication of the amount of the damage. This injury is shown by the increase in costs from the price discrimination and a corresponding reduction in profit. The "amount of damage" requirement is satisfied by the amount of the price discrimination. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). Plaintiff does not have to prove specific lost sales and lost profits as held by the Fifth Circuit.

The jury in the trial of this case found a violation of the Robinson-Patman Act and the Fifth Circuit did not disturb this finding. The jury was entitled from the evidence to infer an injury to competition, and hence to Payne's business, because there was a substantial price discrimination in a market of keen price competition where profit margins were fairly small. *F.T.C. v. Morton Salt Co., supra; Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bargain Car Wash v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1963); *Fowler Manufacturing Company v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert.*

denied, 396 U.S. 1012 (1970). The injury to competition was direct injury to Payne's business.

The Fifth Circuit's decision reversing the trial court's judgment was based on two factors: (1) the alleged failure of Payne to introduce substantial evidence of the "fact" of actual injury under § 4 of the Clayton Act, and (2) the alleged failure of Payne to introduce substantial evidence of the amount of such injury. By holding that Payne had failed to show injury without proof of lost sales or profits, the Fifth Circuit recognized the "pass-on" defense which was repudiated by this Court in *Hanover Shoe v. United Shoe Machinery,* 431 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and misinterpreted the decision in *F.T.C. v. Morton Salt.* Its decision seriously inhibits the effective private enforcement of the antitrust laws under § 4 of the Clayton Act by requiring that a private plaintiff in a price discrimination case show lost sales or profits.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), does not require a plaintiff to show lost profits or sales to establish the fact of injury under § 4 of the Clayton Act. Injury in the form of increased costs (reduced profits) is the damage the Act is designed to remedy. The total amount of the price discrimination is a proper measure of damages under the principles of *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947), *Hanover Shoe v. United Shoe Machinery Corp.* and *Illinois Brick Co. v. Illinois.* In addition to the amount of the price differential damages, Payne proved that the price discrimination was a material contributing cause of its going out of business. Because Payne showed a violation of the antitrust laws, injury of a type prohibited by the antitrust laws, and the amount of the price discrimination, his minimum damages recoverable should be the amount of that price discrimination.

ARGUMENT

I. Proof Of Injury To Competition Under Section 2(a) Of The Robinson-Patman Act Permits An Inference Of Injury Under Section 4 Of The Clayton Act.

The jury's finding of price discrimination was not challenged by the Fifth Circuit's opinion. Nor was the fact that Chrysler was found to have violated the Robinson-Patman Act. The Fifth Circuit's decision reversed the judgment for Payne based on two factors under § 4 of the Clayton Act: (1) alleged failure of Payne to introduce substantial evidence of the causation or "fact" of actual injury, and (2) alleged failure of Payne to introduce substantial evidence of the amount of such injury. *Chrysler Credit Corp. v. J. Truett Payne,* 607 F.2d 1133, 1136 (5th Cir. 1979). For reasons outlined below, the Fifth Circuit erred in reaching those conclusions and in overturning the jury verdict. Substantial evidence was introduced at trial proving actual injury to Payne attributable to the price discrimination and the amount of such injury.

The Fifth Circuit required Payne to prove actual lost sales and profits to support the fact of injury under § 4 of the Clayton Act. *Id.* at 1136. Such a requirement is contrary to the case law and to the policy encouraging the private enforcement of the antitrust laws. The impact of the higher price from Chrysler to Payne cannot be measured in terms of how many sales were lost or "could have been made" by Payne had the price from Chrysler to Payne been equal to the price offered by Chrysler to the other competing dealers. This Court in *Illinois Brick Company v. Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968), established that a plaintiff need not show lost sales. The impact of a single change in relevant conditions, such as the price of

the product from a supplier, cannot be accurately measured in terms of its effect on sales. Proof of such economic analysis only tends to complicate and needlessly protract the litigation of antitrust cases and to hinder effective private enforcement. Thus, the amount of a price discrimination is both a proper and practical measure of damages.

Other cases supporting this "minimum damage" rule also hold that a plaintiff has proven damage to his business by the price discrimination and may recover at a minimum the price differential once he proves a violation of § 2(a) of the Robinson-Patman Act. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947); *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970). Therefore, the Fifth Circuit's decision in this case unreasonably increased the burden of proof on the plaintiff by imposing an inflated standard to prove the fact of damage under § 4 of the Clayton Act.

(a) The Substantial Price Discrimination Against Payne Allowed the Jury to Infer Injury to Payne's Business.

Payne's burden of proving the fact of damage is satisfied by proof of *some* damage flowing from the unlawful price discrimination. It is enough if the price discrimination is shown to be a material cause of the injury. Payne need not exhaust all possible sources of injury in satisfying its burden of proving injury under § 4 of the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 144, n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

The Fifth Circuit's requirement of lost sales and lost profits conflicts with the principles of *Bruce's Juices v. American Can Co.*, *F.T.C. v. Morton Salt*, and *Zenith Radio Corp.* This Court said in *Zenith*:

> The trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable *inference* from the proof of the defendant's wrongful acts and their tendency to injury plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs.'

395 U.S. at 123-124 (emphasis added).

By overturning the jury verdict, the Fifth Circuit in effect says it will not even permit a jury to infer injury in a Robinson-Patman case.

In *F.T.C. v. Morton Salt Co.*, this Court considered the type of proof needed under § 2(a) of the Act to show injury to competition. This Court stated the test applicable to both public and private Robinson-Patman cases:

> Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants *were injured* when they had to pay respondent substantially more for their goods than their competitors had to pay. . . . [T]hat fact would not tend to disprove *injury* to the merchant compelled to pay the [higher] price.

334 U.S. at 46-48 (emphasis added).

Damage, in the form of reduced profits, is the form of injury this Court found to be obvious when there is substantial price discrimination which injures competition. The Court noted that a merchant was actually injured when compelled to pay a higher price than his competitors. *Id.*

at 48. Charging a higher price to one purchaser than is charged to his competitors for the same products diminishes the purchaser's profits, and hence his opportunity to compete. Thus, competition was injured. Although *Morton Salt* was not a private case, the injury to the disfavored purchaser's business was held to exist as a result of the substantial price discrimination. The same proof would obviously show damage to the disfavored purchaser's business under § 4 of the Clayton Act.

Consistent with its analysis in *Morton Salt* this Court has recently held that a private consumer, suing under § 4 of the Clayton Act, is injured in his business or property when he pays more for a product than he legally should. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Payne also showed it paid more and thus was injured under § 4.

This Court previously held in *Bruce's Juices* that proof of price discrimination caused damage to a plaintiff and would permit recovery of damages in at least the amount of that discrimination. Bruce's was concerned about the difficulty of proving damages, but this Court assuaged its fears by pointing out that proof of price discrimination under the Act automatically permits a recovery of the amount of that discrimination. 330 U.S. at 757. It is an anomaly that the very thing that the Supreme Court said could not happen in *Bruce's Juices* has happened in this case. The Fifth Circuit never addressed *Bruce's Juices* even though it is this Court's authoritative statement on damages under the Robinson-Patman Act.

The Fifth Circuit has often recognized that the facts of certain price discrimination cases will support an inference of causation. *Hanson v. Pittsburg Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied* 414 U.S. 1136 (1973) (private case); *Foremost Dairies, Inc. v.*

F.T.C., 348 F.2d 674 (5th Cir. 1965); *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir), *cert. dismissed*, 342 U.S. 875 (1951) (private case). In *Foremost Dairy v. F.T.C.*, the court considered whether the F.T.C. could properly infer the probability of injury to the *customers* of Foremost if they did not receive certain price reductions. In that case, the evidence showed that the rebates were *not* passed through by the purchaser to the ultimate consumer so as to reduce the price of the product. Even though there was no resulting price reduction to the consumer, the court held that if the rebate, which in effect was a price reduction to the purchaser, is sufficient to afford that purchaser a significant savings, and it would, if reflected in the resale price to the consumer, have a noticable effect on the decision of the consumer to purchase, then "an inference of injury [to competition] may properly be indulged." *Id.* at 680. The court held that it was unnecessary that there be evidence to prove that the favored customer actually undersold his competitors. The substantial price advantage given by the rebates could afford the favored buyer a material capital advantage by enlarging his profit margin or enabling him to offer customer-attracting services which gave him substantial advantage over his competition. *Id.* Thus, an injury to competition is also an injury to the business of the disfavored customer.

The seventh circuit also recognizes that price discrimination injures competition and damages the disfavored purchaser. In *E. Edelman and Company v. F.T.C.*, 239 F.2d 152, 154-155 (7th Cir. 1956), the court held that a price differential, without more, in the context of keen competition and tight profit margins, furnishes sufficient proof to infer injury to competition under the Robinson-Patman Act. In the instant case, price competition was keen, the

discrimination was substantial, and the profit margins were very small[7] when compared with the large rebates. *See*, for example, Plaintiff's Exhibits 14 and 52; TR. 49-51; 222-223; App. 243.

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), former Justice Clark discussed the elements required to show causation so that a plaintiff might recover under the Robinson-Patman Act. Justice Clark cited *F.T.C. v. Morton Salt Company* where the Supreme Court said that the price differential must only be a "substantial" price differential sufficient to "influence retail prices" before an inference can be sustained to show a substantial lessening of competition. Plaintiff need *not* show lost sales. 466 F.2d at 1174. *See also, Perkins v. Standard Oil of California,* 395 U.S. 642, 644-645, 648-649 (1969). Justice Clark also cited with approval the concurring opinion of Justice White in the case of *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 143-144 (1968):

---

[7]Rebates sometimes were several hundred dollars per car. Chrysler's own analysis of the profits showed that competition was keen and profits fairly low compared to the amount of the rebate on each car. *See* pg. 6, *supra*. Given the fact that the amount of price reduction under the rebate programs were sometimes as much as $300 per car (Pl. Ex. 52; App. 243), that Payne having to "over-allow" on the used car trade ins in order to get new car business, and that Payne always had the lowest profit margins on its used car operations, the jury could easily find that Payne was caused to lose sales and profits and eventually go out of business because of the rebate programs.

This same analysis can be used to compare the price differentials to the profits on new car operations. Because Payne had chosen to "over-allow" on its used cars to gain the new car sales, the net profit figure on new cars may be slightly inflated for Payne. Nevertheless, when taking Payne's net profit figures from its dealer financial statements (Pl. Ex. 17-35) and comparing them to the other dealers' net profits as shown on their dealer financial statements, the average net profit margins in 1971 varied from $-32.59 per car for Central to $130.80 per new car for Vestavia; in 1972 from $26.50 for Roebuck to $197.76 for Vestavia; in 1973 from $35.00 for Central to $72.53 for Payne. These figures contain a small number of fleet sales, but those are so small as to not have any appreciable effect.

> [I]t would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury . . . or "substantially contributed notwithstanding other factors contributed also". . . .

[emphasis added].

Causation of the "fact" of damage can be inferred from the price discrimination itself. *Grace v. E. J. Kozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976). When the plaintiff proves it paid a higher price for the product than it otherwise would have paid absent the discrimination, the court can infer injury to the plaintiff. *Id.* The illegal price discrimination effectively precluded the realization of [plaintiff's] maximum profit potential, so that the fact of damage was adequately established." *Id.*

During the oral argument of *Morton Salt*, Mr. Justice Jackson, who authored *Bruce's Juices*, reaffirmed the holding in *Bruce's* that a price discrimination by itself causes injury:

> "A fellow who has got to pay more, has got less left — less in profit, less to carry on the business."

United States Law Week, vol. 16, No. 36, pp. 3276-77 (March 16, 1948).

Since Payne proved a price discrimination that injured competition, it is entitled to damages.

(b) The Inflated Standard of Proving the Fact of Damage Is Contrary to the Policy of Enforcing the Antitrust Laws.

The limitation placed upon the enforcement of the Act by the Fifth Circuit's decision, which requires an almost impossible standard of proof — proof of actual lost sales and lost profits resulting from the price discrimination — will totally undermine the effective enforcement of the Act by

private parties. It requires the plaintiff to prove a totally speculative figure, i.e. to forecast the amount of lost sales in the market by assuming what plaintiff would have sold absent price discrimination. This type proof is not only difficult, but is fraught with problems of time, expense and hearsay conclusions. The imprudence of requiring proof of lost sales is shown in the following quotation from this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 492-493:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine in the real economic world, rather than an economist's hypothetical model, is *what effect a change in a company's price will have on its total sales.* (emphasis added).

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court has reiterated its position that the impact of a single change in relevant conditions, such as a change in the price of the product from the supplier, cannot be accurately measured in terms of lost or gained sales. As this position is translated into the instant case, proof of the higher price from Chrysler to Payne cannot be measured in terms of how many sales were lost by Payne had the price from Chrysler to Payne not been higher than to other dealers. By requiring proof of lost sales, the Fifth Circuit circumvented this Court's holdings in both *Hanover Shoe* and *Illinois Brick*.

The fundamental purpose of the Robinson-Patman Act is to have each market participant participate on equal footing. Kinter, *A Robinson-Patman Primer* 3 (The Mac-

Millan Company 1970). Commentators recognize that the primary goal of the Robinson-Patman Act is "to preserve the independence of the small merchant as a factor in his local community." J. McCord, *Commentaries on the Robinson-Patman Act* 20 (Practicing Law Institute 1969); *Price Discrimination and Related Problems Under the Robinson-Patman Act* (Joint Comm. on Cont. Leg. Ed., Amer. Law Inst./Amer. Bar Ass'n. 2d, rev. ed. 1959). The attainment of this goal is virtually impossible under the standards set by the Fifth Circuit's opinion in this case. There is no logical reason to require additional proof of injury (specific lost sales or profits) under § 4 of the Clayton Act once a violation of § 2 (a) of the Robinson-Patman Act occurs where an injury to competition has been shown. Under the Robinson-Patman Act, when a plaintiff shows "injury to competition" by the price discrimination, that simultaneously proves the injury to his "business or property" under § 4 of the Clayton Act. *See, F.T.C. v. Morton Salt Co.* A plaintiff should not have to prove specific lost sales or lost profits. Since his business was suffering from a higher cost than his competition due to the price discrimination, his injury is clear. This price discrimination is an "over-charge" of costs which reduces the actual profits of the plaintiff's business and his ability to compete.

This Court has long encouraged the private enforcement of the antitrust laws through the use of practical damages rules. Thus, in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), the Court stated:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risks of the uncertainty which his own wrong has created. . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because

> not based on more accurate data which the wrongdoer's has rendered unavailable.

This policy consideration was previously examined by this Court in the context of the same damages issue in the case *sub judice*. In *Bruce's Juices v. American Can Co.*, 330 U.S. at 751-752, the Court emphasized that Congress intended to encourage private litigants to enforce the provisions of the Act. To do so, the practical damage rule which permits damages in the amount of the discrimination should be clearly announced.

A damage rule favoring *practical* enforcement of the Act is necessary because of the ineffective public enforcement and the past failures in private enforcement. Despite clear Congressional intent to encourage private enforcement of the Act, statistics show that it has failed woefully. From 1936 to 1961, there were 111 private cases brought, but damages entered for the plaintiff in only six. Barber, *The Private Enforcement of the Antitrust Laws; The Robinson-Patman Experience*, 30 Geo. Wash. Law Rev. 181, 191-192 (1960). One commentator notes that the major reason for this woeful failure of private enforcement of the Act is the "consequential" damage rule. He explains in detail that the difficulty and complexity of proving damages has caused the private plaintiff's failure in enforcement of the Act. The issue is whether the plaintiff must

> establish his harm with a high degree of precision; must he, in short, assume the difficult burden of proving his claim almost literally to the last penny? Or should the courts be content with an implicit assumption that in most instances disfavored parties . . . will usually sustain some injury and that it may legitimately be defined in accordance with some predetermined formula — as, for example, the extent of the discrimination . . . multiplied by the quantum of the goods

purchased during the relevant time period by the disfavored party?

Id. at 211.

The commentator concludes that most effective enforcement of the Act would result if the courts would utilize the logical and correct reasoning that, once a price discrimination is proved, damage inevitably occurs to the business of the disfavored purchaser because of the higher costs than its competitors, and the amount of that damage is, at a minimum, the amount of the price discrimination.

(c) There Was Actual and Direct Proof of Antitrust Injury.

Payne submits that if all elements of the Robinson-Patman Act violation are proven, then the price difference itself is a form of lost profits. Damaging Payne's ability to compete by increasing its costs and reducing its profits is injury to competition and injury to Payne. This overcharge, or lost profit, is exactly the type of injury the Act was designed to protect against, and Payne should recover a minimum of that amount of damage.

In addition to the lost profit of the overcharge, the following direct proof showed damage caused by the price discrimination:

(1) Payne went out of business because it had to pay the higher costs of the price discrimination (TR. 68-69; 100; 706).

(2) An economist testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite as far as they would otherwise have done had Payne not been charged a higher price from Chrysler

on the cars (TR. 203-204; 255). This higher price hurt Payne's ability to compete in this tough market (TR. 203-204), eventually being a cause of Payne's demise. Chrysler's rebate programs reduced competition in the Birmingham market between the various dealers, had an adverse effect on competition in the market (R. 222), and made Payne unable to compete as well with the other dealers as it could have had it received the same price reduction on the cars (TR. 256-257). The rebates actually injured Payne's business by causing it to lose *profits* it would have made had the cost of the cars been the same to all of the dealers and by diminishing its ability to compete (TR. 256-258).

(3) Payne had to "over-allow" on the used car trade-ins in order to obtain new car business. It also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales. (TR. 65-67; 91-92; 94-95; 126-127). Because of the lower prices from Chrysler to Payne's competition during the rebate program, Payne lost sales to its competitors which could undersell Payne. (TR. 69-70).

(4) The dealer financial statements of the four competing dealers from 1970 through 1974 (Pl. Ex. 17-35; TR. 71; 132-133) support the fact that Payne had to "over-allow" on used car trade-ins in order to obtain business, thereby showing a loss of profits in the used car portion of the business caused by the rebate programs. Chrysler's own employee testified that he noticed that Payne's used car operation was the primary area where Payne lost money, compared to the other dealers (TR. 538-539).

(5) Because of the "over-allowing" on trade-ins Payne lost money on its used car operations (TR. 97-100; 538-539; 593-599). These losses caused the line of credit extended by Chrysler Credit Corporation to be withdrawn and Payne ceased business.

(6) Chrysler was guilty of a substantial price discrimination[8] against Payne in the amount of $81,248.94 (TR. 191). There was keen competition in the market (TR. 45-48) and large rebate payments to Payne's competitors, sometimes as much as $300 per car.[9] Profit margins were generally low on the used cars and new cars. When compared to the amounts of the price discrimination per car, the profit margins were sometimes much smaller.

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), established the basic principle applicable to jury verdicts under § 4 of the Clayton Act. This Court held that if there is *some evidence* in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination. (*Id.* at 648). In *Perkins,* there was no evidence that specific lost sales were caused by the price discrimination. The evidence showed that there was substantial price discrimination, that the defendant passed on the price advantage, at least in part, to the plaintiff's competitors, that the plaintiff's business was losing money, and that Perkins complained to Standard officials of his competitor's price advantage. Similarly, in the instant case, there was evidence of substantial price discrimination which lowered the cost of Payne's competitors' cars, that Payne's business was los-

---

[8]Chrysler's defense at trial was that the rebates, which were paid if the dealer attained quotas based on a "fair share" formula or a dealer's prior rate of travel, were totally fair and "proportionally or equally available" to each dealer. The Judge submitted this issue to the jury, giving a charge on proportional and equal availability under the Robinson-Patman Act. The jury obviously found against Chrysler on that issue, and it is not an issue before this Court. Therefore, the fact that the rebate programs were discriminatory to Payne because they were not proportionally or equally available to it should not be contested by Chrysler in this proceeding.

[9]*See,* for example the analysis of the "Super Earnings" rebate program which shows the results of rebate payments to various dealers under that program in amounts up to $300 per car. (Pl. Ex. 52; App. 243).

ing money and that Payne had talked to Chrysler officials about adjusting his quotas and "fair share" which caused the quotas to be so high. (TR. 73-74). The fact that Payne was over-allowing on used cars, that Payne could not meet its competitors' lower prices and was losing sales, and that Payne's share of the market was diminished established that the price advantage was passed along by Payne's competitors to their customers.

Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970), also supports the fact that injury was directly caused by the price discrimination. The Court held:

> . . . under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award.

Id. at 1252.

The fact of damage to Payne was proved directly.

Prima-facie proof of the fact of antitrust injury is proved in a private secondary line case whenever there has been substantial price discrimination, which is likely to affect the retail sales price, and small profit margins in a market of keen competition. This standard of proof of the fact of injury is supported by the Robinson-Patman Act itself which recognized that the antitrust plaintiff has met its initial burden of proof by showing the existence of substantial price discrimination. Section 2 (b) of the Act, 15 U.S.C. § 13 (b) states:

> Upon proof being made, at any hearing on a complaint under this Section, that there has been discrimination in price . . . the burden of rebutting the prima facie

> case thus made by showing justification shall be upon the person charged with a violation of this Section. . . .

There is no question that, under § 4 of the Clayton Act, a plaintiff must show antitrust injury resulting from the violation of the antitrust laws. Where the Fifth Circuit erred was in failing to realize that there can be proof of a *prima facie* case showing the fact of injury to the extent of the price discrimination when there is evidence of a sustained and substantial price discrimination causing an adverse effect on competition. There is nothing particularly evil or new in this. An even lesser burden of proof for a plaintiff exists in "attempt to monopolize" cases where the element of "dangerous probability" is inferred from specific intent and that specific intent can be inferred from proof of predatory or anti-competitive conduct which unreasonably restrains trade. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir.) *cert. denied* 440 U.S. 936 (1979); *Janich Bros., Inc. v. American Distilling Company,* 570 F.2d 848, 853-854 (9th Cir. 1977).

Moreover, the second circuit has expressly held that:

> Proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition.

John B. Hall, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 28 (2d Cir. 1978). *See also, Samuel H. Moss, Inc. v. F.T.C.*, 148 F.2d 378, 379 (2d Cir.), *cert. denied,* 326 U.S. 734 (1945).

In this case, the jury properly inferred injury to Payne's business as was done in *F.T.C. v. Morton Salt Co.*; *See also, Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Under § 2 (b) of the Act, Chrysler would have the burden of rebutting the inference of injury shown by the evidence.

Chrysler did not meet its burden of overcoming the prima facie case presented by Payne.

There was other supporting evidence of the fact of antitrust injury. Evidence showed that Payne could not meet the lower prices of its competitors and thus lost sales; and that the rebates caused this and caused Payne's going out of business. (TR. 55; 65-69). Payne's share of the market of the new car market dropped substantially from 27% in 1971 to 23% in 1972, during the time when rebate programs used the "fair share" percentages to calculate the quotas. (Def. Ex. 31; App. 268). Payne's sales rebounded somewhat to 25% of the new cars in 1973, but only because the rebate programs had been running for over two years since Vestavia had moved into Payne's trading zone and the quotas (after January 1972, based only on prior rate of travel) were less exaggerated against Payne than they were in 1971 and 1972.[10]

Ample evidence existed to support the jury's inference of injury to Payne's business. Therefore, the Fifth Circuit was erroneous in its decision holding that there was no proof of the fact of antitrust injury flowing from the price discrimination.

---

[10]Although there were no rebate programs running in 1973 which based the quotas assigned to each dealer on the "fair share" percentage of the market, nevertheless there were rebate programs running which did have different quotas assigned to each dealer, with Payne receiving normally the highest quota. These quotas were based upon the previous rate of travel which would not have been a fair and accurate measurement of the market since Vestavia Chrysler-Plymouth had recently moved into Payne's primary trading zone during the middle of 1971. The jury found that the price discriminations resulted to Payne because the rebate programs and the quotas established thereunder were unfair regardless of whether the quotas were based on prior rate of travel or fair share. A prior rate of travel quota, used so soon after the move of Bessemer Chrysler to the Vestavia area right in the heart of Payne's trading zone, would have been unfair to Payne because of the market's confusion and uncertainty from having two dealers recently in the same zone. Less than 25% of the price discrimination occurred in the rebate programs the last one and one-half years of Payne's operation from January 1973 through May 1974. This compares to 75% of the price discrimination occurring from November 1970 through December 1972.

(d) Payne's Damage Was the Type of Damage that the Antitrust Laws Were Designed to Remedy.

The precepts of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), referred to by the Fifth Circuit, do not prohibit Payne from recovering damages in the amount of the price differential. To the contrary, *Brunswick* supports Payne.

The Fifth Circuit erroneously interpreted *Brunswick* to require that a plaintiff must show injury in the form of lost sales or profits to recover under § 4 of the Clayton Act: "Competition is harmed only to the extent that the favored purchaser, by the use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor." *Payne*, 607 F.2d *at* 1136. *Brunswick* did not address the question of the proper measure of damages, nor did it impose a higher standard of proof for injury to competition. *Brunswick* held only that a plaintiff must show that his injuries were the type of loss that the claimed antitrust violations would be likely to cause. *Brunswick*, 429 U.S. at 489.

The *Brunswick* opinion neither sets new standards for proof of causation nor announced a new rule for the calculation of damages. All that *Brunswick* requires is that a plaintiff's loss, however measured, occur by reason of that which made the defendant's acts unlawful. 429 U.S. at 488. In fact this Court recognized that the type of loss that the violations of the antitrust laws would be likely to cause

> does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished.

429 U.S. at 490 n. 14.

Thus, this Court clearly recognizes that injury can be inferred without proof of lost sales. The Fifth Circuit's decision ignores the basic economic reality recognized by this Court on several occasions that one who is required, due to discriminatory pricing, to pay more for his raw goods or materials than his competitors is necessarily harmed in his ability to compete effectively on price. *F.T.C. v. Morton Salt Co.*, 334 U.S. at 46-47.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, this Court reiterated that an antitrust plaintiff can recover without proving more than the price difference:

> Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United over-charged it during the damage period and showed the amount of the over-charge. . . .

Therefore, the Robinson-Patman Act provides a remedy for Payne because of Chrysler's "overcharge" in the form of the price discrimination. It does not matter whether the more favored dealers used the rebates to reduce the price of the cars purchased from Chrysler, increase their sales, pay incentives to the salesmen to increase their sales, used the rebates for other expenses in the company, or merely pocketed those rebates as extra profit. The ultimate effect of the rebates is to make Payne, the less favored dealer, unable to compete as equally or as effectively in the marketplace. Therefore, the rebates *damaged* Payne's business.

II. The Amount Of Damage Was Proved.

(a) The Amount of Price Discrimination Is the Minimum Damage in Robinson-Patman Act cases.

There is substantial case law supporting the rule that, in a market of keen competition with substantial price discrimination, the amount of the illegal price differential will be the minimum damage to the nonfavored purchaser. *Bruce's*

Juices v. American Can Co., 330 U.S. 743, 757 (1947); *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951); *Grace v. E. J. Cozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976); *Fowler Manufacturing Co., v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co.*, 202 F. Supp. 514 (D.C. Mo. 1959); *State Wholesale Groceries v. Great Atlantic & Pacific Tea Co.*, 202 F. Supp. 768 (D.C. Ill. 1961).[11]

The amount of the overcharge therefore would be the first category of direct damage. This Court has stressed in *Bruce's Juices* that the proof of damages would not be difficult since the purchaser could recover the overcharge without proving more than illegality of prices, in all but extraordinary circumstances:

> We have assumed for the purposes of this case that Petitioner could establish that the prices Respondent charged were discriminatory so that they violated the Act. But if Petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by

[11]Some courts have held that the amount of the overcharge is not necessarily proof of the amount of damages to the disfavored plaintiff. *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied* 353 U.S. 965 (1957); *Dantzler v. Dictgograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962); *cert. denied* 372 U.S. 970 (1963); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961). The *Dantzler and Kidd* cases simply say that there must be a causable connection between price discrimination and injury to plaintiff. *Dantzler* does not consider the issue of when the overcharge is a proper measure of damages. In *Kidd*, plaintiff insisted that he be awarded the overcharge as damages after a jury found a violation of § 2 (a), but the jury also found that plaintiff had suffered no damages. *Kidd* does not cite *Enterprise* and is not inconsistent with *Bruce's Juices* case. In the *Enterprise* case, the plaintiff completely failed to prove injury to itself that was caused by defendant's price discrimination. Therefore, whether or not damages should have been presumed under the facts in that case does not bear on what is the appropriate *measure* of damages when injury and causation have been proved, as they were proved in the instant case.

> the same evidence. For despite petitioner's plaint on the difficulty of proving damages, it would establish its right recover three times the discriminatory difference *without proving more* than the illegality prices. If the prices are illegality discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination.

330 U.S. at 757 (emphasis added).

This holding was essential to the Court's disposition of *Bruce's Juices* and was not mere dicta. Bruce's had sought to raise the Robinson-Patman Act as an affirmative defense to a seller's action on a purchase contract for cans, alleging that the contract price was discriminatory and in violation of the Robinson-Patman Act. American Can argued that Bruce's should not be able to avoid paying for the cans all together, and if the price violated the Act, Bruce's could bring a separate law suit for damages under § 4 of the Clayton Act. Bruce's argued, however, that separate suit was an inadequate remedy because of the expense of a separate suit and because it would be too difficult to prove damages. Thus, the means of proving damages in such a lawsuit was placed directly in issue.

The Court rejected Bruce's argument, holding that the violation of the Act was not a defense to the contract. But the Court responded directly to Bruce's arguments that damages would be too difficult to prove by holding that "clearly" Bruce's could recover three times the amount of discrimination "without proving more than the illegality of the price." *Id.* The Fifth Circuit's holding in the instant case should be overturned because it destroys the protection the Act gives to small businessmen and it imposes an unrealistically high and difficult standard of proving damages.

This Court also determined in *Bruce's Juices* that the relatively moderate provisions of a draft of the Robinson-Patman Act, § 2(e), which would have established the amount of damage as the amount of the price differential, had been deleted in the final drafting of the Act because it was merely

redundant and other elements of damage should be permitted as well. This Court considered that proposed provision and stated:

> . . . [A] proposed provision of the Act, passed only by the Senate which later receded, shows that Congress gave consideration to no sanction more extreme than to compel the remission of the excess charged. . . . Congress declined to adopt this relatively moderate provision. . . .

330 U.S. at 751.

Therefore, it is clear that Congress and this Court thought the amendment would have *limited* the damages recoverable to just the price difference. The current damages provision in § 4 of the Clayton Act is much broader and routinely permits proof of other damages, in addition to the normal price differential damages. Certainly it can not be logically argued that the omission of this language from the final version of the Robinson-Patman Act prohibits recovery of damages in the amount of the price discrimination. There is no reasonable evidence to support that argument. This Court would do a great disservice to the private enforcement of the Act if it were to reverse itself and prohibit the price differential as a measure of damages. The differential damages, such as in our case, are, in essence, the minimum amount of *profit* lost by Payne on the sales it did make on the cars that cost it more than the favored dealers.

The Fifth Circuit had approved the price differential damage principle when, on the remand of the *Bruce's Juices* case from the Supreme Court, the Fifth Circuit stated:

> The evidence conclusively reveals that plaintiff's losses . . . was the result of competition from two other citrus fruit canners. . . . These two competitors had received from the defendants special discounts on the price of a particular type of Iscan which had been denied to plaintiff. This discrimination in favor of plaintiff's above-named competitors was manifestly harmful to plaintiff's business, for the reason that the costs of the juice cans represented a large percentage of the total cost of the citrus product, and the discriminatory high price paid

> by plaintiff for an Iscan of like grade and quality *diminished its profits and helped destroy its financial ability to withstand competition.*
>
> * * *
>
> We have carefully reviewed the action of the district court in awarding damages in this case, and have reached the conclusion that the judgment rendered is fully in accord with the principles enunciated in the applicable authorities. *See Bruce's Juices, Inc. v. American Can Company*, 330 U.S. 743.

American Can Co. v. Bruce's Juices, 187 F.2d 919, 922, 924 (5th Cir. 1951), *modified on other grounds and rehearing denied*, 190 F.2d 73, *cert. dismissed*, 342 U.S. 875 (emphasis added).

The Ninth Circuit's opinion in *Fowler Manufacturing Company v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970), demonstrates the proper application of *Bruce's Juices*. In *Fowler*, the Court held that the congressional purpose behind the Robinson-Patman Act will be better served if damages in the amount of the price differential were permitted. After an extensive and well reasoned analysis of the Supreme Court's decision in the *Bruce's Juices* case, the court stated:

> Furthermore, in a construction of the Act in relation to its purpose, it would seem apparent that such a direct-damage right would more effectively serve to curb the discriminations which Congress viewed as being most often exercised against smaller competitors, and whose abolition it sought to accomplish primarily for that reason, than the more difficult consequential-damage rule of the *Enterprise* case. In its significance for obtaining compliance with the Robinson-Patman Act, such a damage thrust is also more fully consonant with the motive which the Court recognized in *Bruce's* as underlying all private antitrust recovery, when it said:
>
> 'It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his dam-

> ages are to be made good three-fold, with costs of suits and reasonable attorney's fee.'

415 F.2d at 1251-1252.

(b) Price Overcharge Is The Minimum Amount of Damage in Sherman Act Cases.

The proper rule for damage in this case was established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *Hanover Shoe* holds that, in suing under § 4 of the Clayton Act for treble damages, a purchaser is injured in at least the minimum amount of the illegal *overcharge*. *Id.* at 494. The measure of damages should not be different in a Sherman Act case than in a Robinson-Patman Act case. Both the price discrimination in a Robinson-Patman case and the increase in the "fixed" price under the Sherman Act are illegal overcharges. In *Hanover Shoe*, the defendant, whose monopolization of the shoe machinery industry had resulted in overcharges in the form of increased costs to the plaintiff, raised as a defense that the plaintiff had passed on the illegal overcharges, thereby suffering no injury or damages. This "passing on" defense would have required proof of: (1) the factors influencing the plaintiff's pricing decisions; (2) how the plaintiff would have priced its products in a free market; and (3) what the plaintiff's total sales would have been in a free market. Removing the incentive of the overcharged direct purchaser to bring a treble damage action would substantially reduce the effectiveness of private enforcement of the antitrust laws. The Court realized that the amount of economic proof necessary to establish such a defense would be terribly expensive, time consuming and normally insurmountable. *Hanover Shoe*, 392 U.S. at 493. Thus, the Court held that the plaintiff had proved its injury and the amount of its damages merely by proving that it had been overcharged and the amount of the overcharge. *Id.* at 494.

The Fifth Circuit's requirement that a plaintiff demonstrate lost sales or profits will require an economic analysis even more complicated than that rejected by the court in *Hanover Shoe*. While there were only two parties involved in *Hanover Shoe*, a Robinson-Patman case normally involves numerous parties. A plaintiff in a Robinson-Patman Act case would be forced to analyze the effects of the price discrimination not only on his own pricing decisions, but also the effect of that price discrimination on the pricing decisions of all his favored competitors, who are not even properly parties to the lawsuit. The Fifth Circuit, therefore, has made mandatory a type of economic analysis which was not permitted by this Court in *Hanover Shoe* on the grounds that it was too complex, too wasteful of judicial time, and undermined the enforcement policies of treble damage actions.

The reasoning that led this Court to hold in *Hanover Shoe* that the amount of a price overcharge is a proper measure of damages leads equally well to the conclusion that the total amount of a price discrimination is a proper measure of damages. A price discrimination is merely a form of overcharge. An overcharge resulting from monopolization, like that in *Hanover Shoe*, is determined by subtracting the lower charge that would have been charged in a free market from the actual charge. An overcharge resulting from price discrimination (as in the case *sub judice*) is determined by subtracting the actual charge to the favored purchaser from the actual charge to the disfavored purchaser. The calculation of overcharge in a monopolization case is even more speculative than in a price discrimination case since the theoretical price in a free market cannot be determined empirically, whereas the actual charges in a price discrimination situation can.

In both situations there is an illegal overcharge. The gravamen of the violation in both cases is that the plaintiff has been charged to much and should be compensated for the overcharge. There is no statutory basis for distinguishing between a price overcharge and a price discrimination. *See, City of Mishowaka v. American Electrical Power Co.*, 465

F.Supp. 1320, 1340 (N.D. Ind. 1979), holding that a distinction drawn in *ICC v. United States*, 289 U.S. 385 (1933), between price overcharge and price discrimination is either inapplicable to antitrust actions or overruled by *Hanover Shoe*.

In *Illinois Brick Co., v. Illinois*, 431 U.S. 720 (1977), this Court reaffirmed the holding of *Hanover Shoe*, citing with approval the Court's holding that a purchaser is injured at least in the amount of the illegal overcharge. *Id.* at 724. In that case, the Court was considering damages in a § 1 Sherman Act case for overcharges to indirect purchasers who were trying to recover the amount of the overcharge which had been passed on by the direct purchaser of the antitrust violator. The Court held that even if the direct purchaser had passed on the illegal overcharge, the indirect purchaser could not recover in an antitrust suit for that illegal overcharge. Only the direct purchasers were allowed to sue to recover the amount of the overcharge because this encouraged private enforcement of the antitrust laws and simplified the litigation. Therefore, even if there had been no lost sales or lost profits, the plaintiff would be able to recover the amount of the illegal overcharge.

(c) The Amount of the Price Discrimination Is A Practical Measure of Damages.

Like the overcharge in a Sherman Act case, the price discrimination is an element of the damage in this case. The rebate programs directly caused Payne two separate categories of damage redressable under the Robinson-Patman Act: (1) reduction of profits on current sales, i.e., loss of profits by its higher costs (the overcharge), and (2) the going concern value of Payne's business which the rebate programs caused to fail. Payne could not measure the reduction of profits except in the minimum amount of the price discrimination. Evidence of the value of the Payne business ranged from $50,000 to $170,000. Clearly, the injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act

was designed to compensate. Substantial evidence showed the amounts of that damage. If the price discrimination is shown to have an adverse effect on competition, then that "effects" damage to Payne in those amounts.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of the antitrust laws, the plaintiff has a lesser burden of proof in showing the *amount* of damage. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974), *cert. dismissed*, 49 U.S. 987 (1974). All the plaintiff must do after showing injury resulting from violation of the antitrust laws is to show "some indication of the amount of the damage done." *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979).

Chrysler and the Fifth Circuit have relied on a Second Circuit case which held that increased costs (the price discrimination) to the purchaser is not a direct damage unless the plaintiff proves that the increased cost was absorbed, and not passed on to the customers. *Enterprise Industries, Inc. v. Texas Company*, 240 F.2d 457 (2d Cir. 1957), *cert. denied* 353 U.S. 965 (1957). Both *Enterprise* and the Fifth Circuit's decision require plaintiff to demonstrate that it did not pass on the discriminatory charge to its customers, and lost sales because of it. Essentially they both utilize the pass-on theory as a defense to a Robinson-Patman case, and are inconsistent with the Supreme Court's decisions. *Illinois Brick* and *Hanover Shoe* have both rejected the "passing-on" theory, whether it be as a defense, as in this case, or as a weapon for an indirect purchaser to use as a plaintiff in an antitrust suit. Therefore, *Enterprise* has been overruled.

(d) Damages Awarded In This Case Were Appropriate Under Any Standard.

The Fifth Circuit erred in two respects: (1) there was actual proof of causation of antitrust damage to Payne, and

(2) the measure of damages to Payne would be, at least the total amount of price discrimination and the going concern value of the business. The trial court correctly charged the jury that the amount of the price differential could be considered by it in determining the amount of any damage that it might find Payne suffered, but the trial court incorrectly charged that amount of differential was not automatically a measure of damage (R. 806-807).[12] Despite the higher standard, the jury properly found from the evidence both types of damages.

Payne submits that the district court's judgment in the full amount should be reinstated. There was evidence of direct damage to Payne's business caused by the rebates totaling

---

[12]The trial judge incorrectly instructed the jury on the elements of damage. He stated:

> . . . the question is not how much better off the plaintiff, Payne, would have been if it had received the same concessions as the favored Chrysler-Plymouth dealers, but rather how much worse off Payne is because others received such concessions.
>
> The plaintiff, Payne, is only injured if you find that as a proximite result of a violation of § 2(a) of the Robinson-Patman Act by the defendant, Payne lost customers to the favored dealers for Payne was forced to lower its retail price in order to compete with the favored dealers; and I might add, to pay more for used cars traded in on new automobiles, an over-allowance.
>
> • • •
>
> Moreover, I further charge you that as a matter of law, you cannot compute damages for the period. . . by merely taking the differences between the price alleged to have been paid by Payne Company and the price allegedly paid by the favored Chrysler-Plymouth dealers. The law allows the plaintiff only to recover damages actually sustained by reason of a violation of the Robinson-Patman Act, and therefore, the mechanical price difference, as such, in and of itself, is not the proper measure of damages in this case. (TR. 803-804; 806).

Payne excepted to that charge. Nevertheless, the jury found Payne to have met that inflated standard of proof, and that Payne had showed actual damage to its business by virtue of a violation of the Act. Even if the Court were to find that the amount of price discrimination is not the correct minimum amount of damage, the Fifth Circuit committed plain error by reversing the jury verdict because of substantial evidence of the fact of damage and evidence showing an indication of the amount of damage.

$81,248.94. A prima facie case of damage to its business was established by the injurious discrimination, and Chrysler never rebutted that prima facie case. In any event, there was certainly sufficient evidence from which the jury could *infer* actual injury to Payne's business if one assumes there was no direct proof of causation.

One of the categories of damage suffered by Payne, in addition to the minimum amount of price discrimination, was the failure of Payne's business resulting from the price discriminations it had suffered over the years. Competent evidence from an economist and from the owner of the business showed that the value of the business was between $50,000 to $170,000 at the time it failed in 1974. The jury returned a verdict of $111,247.48. If, for some reason, this Court believes the going concern value of Payne's business to be too speculative, the damages, at a minimum, in the amount of the price discrimination of $81,248.94 were proved. This Court should then affirm the judgment in at least that amount.

To recover for a violation of the Robinson-Patman Act a plaintiff must prove several things: (1) a violation of § 2(a) of the Act, and (2) some injury in fact to his business resulting from the price advantage given the favored purchaser. Injury to competition is shown when there is substantial price discrimination in a keen market with fairly low margins. At the same time injury to competition is shown, the plaintiff has established damage to his own business or property. A competitively harmful business practice exists in his own industry which was caused by the price discrimination. Yet the Fifth Circuit's decision requiring proof of lost sales in effect leaves the plaintiff no remedy and permits the defendant who has been found to have engaged in illegal conduct to continue to exact the excessive charge. In effect, a defendant could admit liability in a Robinson-Patman Act case stating that it had discriminated in price but would have judgment in its favor because the damages could not be *measured* by lost sales.

Under the decision of the Fifth Circuit the violator is not required to pay back the monies wrongfully charged but only must pay any lost sales and profits resulting therefrom. In the business world, a "lost sale" and the reasons therefore could only be proven through examination of the mental processes of the lost purchaser. In the automobile, grocery, appliance, gasoline, and other similar industries, such proof would require testimony from literally thousands of actual and potential customers over a substantial period of time and would not avoid causation problems resulting from other subjective factors involved in a decision to purchase. This standard of proof cannot be met in any industry where there are multiple sellers and purchasers and other substitute products. As was the case in *Hanover Shoe*, where a price discrimination has spanned many years it is extremely difficult to determine whether and to what extent the plaintiff would have "passed on" the discrimination to his customers, or where his customers would have gone. The additional time and expense involved in litigating such questions would produce inevitable deterent effects on private antitrust actions which the Supreme Court has sought to avoid. This very problem is reason enough to stop the spread of such a restrictive burden under the Robinson-Patman Act.

Once the illegality of the price and injury to competition and business have been proven, the plaintiff at a minimum should recover back the monies wrongfully paid. The violator certainly should not be entitled to keep the benefits of his illegal charge. The source of that benefit has been the plaintiff and the monies should be returned to him.

CONCLUSION

The Petitioner prays that this Court:

(1) Reverse the Fifth Circuit's judgment which directed the district court to enter judgment for Chrysler Motors Corporation;

(2) Reinstate in full the judgment of the district court, plus interest from the date of the original judgment;

(3) Award Petitioner costs of court and a reasonable attorney's fee for all work during the appellate proceedings of this case.

Respectfully submitted,

C. LEE REEVES
Attorney for Petitioner

Sirote, Permutt, Friend, Friedman
Held & Apolinsky, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
933-7111

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief on the Merits has been served upon counsel of record for all parties to this proceeding by depositing the same in a United States Post Office with first-class postage prepaid to J. Frederick Ingram and J. Ross Forman III, counsel of record for Chrysler Motors Corporation, at their post office address on the .... day of ....., 1980.

_____

Of Counsel

Supreme Court, U.S.
FILED
DEC 30 1980
MICHAEL RODAK, JR., CLERK

NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF ON THE MERITS

J. Ross Forman, III
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000
Counsel for Respondent

Of Counsel:
A. J. Noble, Jr.
Joseph W. Letzer
J. Patrick Logan
Thomas, Taliaferro, Forman,
Burr & Murray
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF ON THE MERITS

QUESTIONS PRESENTED

The questions presented by the petitioner are not properly framed in that they assume facts which were never established by probative evidence at the trial of this case, and misconstrues the holding of the Fifth Circuit. The questions presented are properly framed as follows:

1. In a private treble damage action based upon an alleged violation of §2 (a) of the Robinson-Patman Act, 15 U.S.C.A. §13 (a), is the plaintiff automatically entitled to damages in the amount of the alleged price difference, thereby dispensing with the necessity of proving (1) actual loss to his business as a proximate consequence of the discrimination and (2) the amount of said injury?

2. Whether bare, self-serving, conclusory assertions of damage by Mr. Payne, which were totally uncorroborated by other evidence, constitute sufficient evidence to prove that the petitioner suffered antitrust injury as a proximate consequence of respondent's retail sales incentive programs?

3. Did the Fifth Circuit err in holding that there was insufficient evidence to show either the fact of antitrust damage or the amount of such damage?

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Authorities v

Statement Of The Case 1

I. The Proceedings Before The Fifth Circuit 1

II. Statement Of The Facts 3

Summary Of The Argument 12

Argument 14

I. The Fifth Circuit's Decision Is Clearly Correct And Is In Accord With This Court's Requirement For Recovery Of Treble Damages 14

II. The Legislative History Of The Robinson-Patman Act Supports The Fifth Circuit's Opinion And Compels Rejection Of The Automatic Damage Theory 19

III. The Automatic Damage Theory Has Been Rejected By The Overwhelming Majority Of Courts 26

IV. The Sherman Act Cases Do Not Support An Automatic Damage Theory In Robinson-Patman Act Cases And Are Not In Conflict With The Fifth Circuit's Opinion 36

V. Petitioner Did Not Prove That It Suffered Any Antitrust Injury 38

VI. Petitioner Used Improper Methods Of Calculating Damages Which Did Not Reflect Antitrust Injury 42

(a) The Amount Of The Alleged Discrimination Does Not Reflect Antitrust Injury In This Case 43

TABLE OF CONTENTS – (Continued)

Page

(b) Petitioner's Going Concern Calculations Were Based Upon Speculation And Unsupported Assumptions And Do Not Reflect Antitrust Injury 45

VII. The Public Interest Will Be Served By Affirming The Fifth Circuit 48

Conclusion 50

Certificate Of Service 51

TABLE OF AUTHORITIES

Cases: *Page(s)*

Albrecht v. Herald Co., 452 F.2d 124 (8th Cir. 1971) 47

Alexander v. Texas Co., 165 F.Supp. 53 (W.D. La. 1958), *sup. op.*, 165 F.Supp. 53 (W.D. La. 1958) 29

American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) 40

American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930) 24, 25, 35

American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951) 29, 31

American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) 31

Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960) 35

Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953) 37

Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) 40

Baxter Imports, Inc. v. Saab-Scania of America, Inc., 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) 3, 29, 33

Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co., 202 F.Supp. 514 (E.D. Mo. 1959) 29

Berkey Photo, Inc. v. Eastman Kodak Co., 457 F.Supp. 404 (S.D. N.Y. 1978), *modified on other grounds*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, ... U.S. ....., 62 L.Ed.2d 783 (1980) 28

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) 45

TABLE OF AUTHORITIES – (Continued)

Page(s)

Blue Chip Stamps v. Mano Drug Stores, 421 U.S. 723 (1975) 26

Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947) 22, 29, 30, 33, 37

Bruce's Juices v. American Can Co., 87 F.Supp. 985 (S.D. Fla. 1949), *aff'd* 187 F.2d 919 (5th Cir. 1951) 40

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 2, 12, 14, 16, 24, 30, 34

Chrysler Credit Corp. v. J. Truett Payne Inc., 607 F.2d 1133 (5th Cir. 1979), *cert. granted*, ... U.S. ....., 66 L.Ed.2d 20 (1980) 29

City of Mishowaka, Indiana v. American Electrical Power Co., 465 F.Supp. 1320 (N.D. Ill. 1979), *rev'd*, 616 F.2d 976 (7th Cir. 1980) 28

Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780 (10th Cir. 1964) 35

Dantzler v. Dictograph Products, Inc., 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963) 29, 39

Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) 47

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980) 28, 32, 37

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) 29, 30

Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) 2, 25, 26, 32, 33, 37

TABLE OF AUTHORITIES – (Continued)

Page(s)

Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970) 45

FTC v. Bunte Bros., 312 U.S. 349 (1940) 26

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 15, 31

FTC v. Ruberoid Co., 343 U.S. 470 (1952) 26

FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959) 26

Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) 39

Flood v. Kuhn, 407 U.S. 258 (1972) 26

Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965) 15

Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) 15, 29, 30

Freedman v. Philadelphia Terminals Auction Co., 197 F.Supp. 849 (E.D. Pa. 1961), *aff'd*, 301 F.2d 830 (3d Cir.), *cert. denied*, 371 U.S. 829 (1962) 28

Grace v. E. J. Kozin Co., 538 F.2d 170 (7th Cir. 1976) 29

Great Atlantic and Pacific Tea Co. v. FTC, 440 U.S. 69 (1979) 26

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 26

Guyott Co. v. Texaco, Inc., 261 F.Supp. 942 (D. Conn. 1966) 28

Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 34

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 36

Hasbrouck v. Texaco, Inc., 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980) 29, 34, 37

TABLE OF AUTHORITIES – (Continued)

Page(s)

Herman Schwabel, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) 46, 47

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 36

Interstate Cigar Co. v. Sterling Drug, Inc., 1980-2 Trade Cases ¶63,430 (S.D.N.Y. 1980) 28

Interstate Commerce Commission v. United States ex rel. Campbell, 289 U.S. 385 (1933) 24, 27, 28, 37, 38

Joseph E. Seagram & Sons v. Hawaiian Oke Liquors, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) 45, 47

Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) 34

Kelly v. General Motors Corp., 425 F.Supp. 13 (E.D. Pa. 1976) 28

Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) 45

Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961) 29

Krieger v. Texaco, Inc., 373 F.Supp. 108 (W.D. N.Y. 1973) 28

Lombino & Sons, Inc. v. Standard Fruit and Steamship Co., 1975-2 Trade Cases ¶60,527 (S.D.N.Y. 1975) 28

McCaskill v. Texaco, Inc., 351 F.Supp. 1332 (S.D. Ala. 1972), *aff'd sub. nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973) 29

Momand v. Universal Film Exchanges, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949) 39

Morning Pioneer, Inc. v. Bismarck Tribune Co., 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974) 33

TABLE OF AUTHORITIES – (Continued)

Page(s)

Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958) 37

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) 14, 30, 34, 38, 40

Pollock & Riley v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974) 47

Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974) 44

Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975) 34

Sano Petroleum Corp. v. American Oil Co., 187 F.Supp. 345 (E.D. N.Y. 1960) 28

Shumate & Co. v. National Association of Security Dealers, 509 F.2d 147 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) 39

Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918) 38

Standard Motor Products, Inc. v. FTC, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) 31

Standard Oil Co. v. Moore, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958) 46

State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 202 F.Supp. 768 (N.D. Ill. 1961) 29, 31

Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949) 32

Uniroyal, Inc. v. Jetco Auto Service, Inc., 461 F.Supp. 350 (S.D.N.Y. 1978) 28, 37

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 37

Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 906 (1963) 46

TABLE OF AUTHORITIES – (Continued)

Page(s)

Youngston v. Tidewater Oil Co., 166 F.Supp. 146 (D. Ore. 1958) 29, 35

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979) 29, 33

Statutes:

Clayton Act, Section 2 (Robinson-Patman Act), 15 U.S.C. §13 ..... *passim*

Clayton Act, Section 4, 15 U.S.C. §15 ..... *passim*

Clayton Act, Section 7, 15 U.S.C. §18 16

Other Authorities:

F.T.C., Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935) 17

H.R. 8442, 74th Cong., 1st Sess. (1935) 18, 19

S. 3154, 74th Cong., 1st Sess. (1935) 18, 19

To Amend The Clayton Act, Hearing Before The Committee On The Judiciary, House of Representatives, Hearings On H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess. (1935) 19, 20, 22, 23, 25

To Amend The Clayton Act, Hearing Before A Subcommittee Of The Committee On The Judiciary, House of Representatives, Hearings on H.R. 4995, H.R. 8442, H.R. 10486, 74th Cong., 2d Sess. (1936) 23

Hearings on H.R. 4597 Before Subcomm. 3 Of The Comm. On The Judiciary, 83d Cong., 1st Sess. 12 (1953) 31

H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 20

S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 20, 21, 24

H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. (1936) 21

80 Cong. Rec. 6348 (1936) 22, 24

TABLE OF AUTHORITIES – (Continued)

Page(s)

80 Cong. Rec. 6436 (1936) 21
80 Cong. Rec. 8242 (1936) 20
51 Cong. Rec. 16274-16275 (1914) 24
51 Cong. Rec. 16317-16319 (1914) 24
21 Cong. Rec. 2456 (1890) 24
Report of Nixon Task Force on Productivity And Competition, ATRR, No. 413, X-7 (June 10, 1969). 31
Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 Notre Dame Law. 647 (1967). 34
Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum L. Rev. 979 (1977) 18
Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1 (1971). 33, 34, 49
Note, *Private Recovery Under The Robinson-Patman Act: Confusion in the Courts on The Proper Measure of Damages*, 21 Syracuse L. Rev. 941 (1970). 31, 33, 34, 49
Rez, *Causation and Automatic Damages in Secondary-Line Injury Cases under §2(a) of the Robinson-Patman Act: Is Fowler v. Gorlick Dead?* 55 Notre Dame Law. 660 (1980). 34, 49
Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059 (1957). 17, 18, 19, 32, 33

STATEMENT OF THE CASE

I. The Proceedings Before The Fifth Circuit.

Following the adverse jury verdict and the denial of its motion for judgment notwithstanding the verdict or for new trial, respondent, Chrysler Motors Corporation (hereinafter sometimes referred to as "Chrysler"), appealed to the Fifth Circuit Court of Appeals on several separate and distinct grounds. These grounds may be summarily categorized as follows: First, respondent urged that there was a total failure of proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C.A. §13(a), since each sales incentive program was carefully designed to provide all Chrysler dealerships with an equal opportunity to participate therein. Respondent also argued that there was not sufficient evidence to allow the jury to infer that injury to competition might result from the programs. Second, respondent urged that petitioner was not entitled to recover damages under §4 of the Clayton Act, 15 U.S.C.A. §15, since it had not proved (1) that it had in fact suffered any antitrust injury as a proximate consequence of said program or (2) the amount of such injury. Third, respondent challenged several parts of the trial judge's charge to the jury. And, fourth, respondent challenged several evidentiary rulings by the trial judge.

The Fifth Circuit only found it necessary to consider the second category of urged error, recognizing that a failure to satisfy the requirements of §4 of the Clayton Act precluded the recovery of damages regardless of whether there had been a violation of the antitrust laws.[1] In a well reasoned

[1]The Fifth Circuit did not affirm the jury's finding of a violation of §2(a) as suggested by petitioner. (Pet. Br. 3). Instead, the court specifically stated that it found it unnecessary to consider whether petitioner proved a violation of §2(a) of the Robinson-Patman Act, since it found petitioner had not proven its right to recover damages under §4 of the Clayton Act. 607 F.2d at 1135 (J.A. 4).

and legally sound opinion written by Judge Frank M. Johnson, Jr., the Fifth Circuit held that petitioner had not satisfied the requirements for recovering damages under §4 since it (1) had failed to prove that it had sustained cognizable antitrust injury from the sales incentive programs and (2) had failed to prove the approximate amount of any such injury. Following the lead of the Second Circuit in *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), and this Court's teachings in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Fifth Circuit held that in a §2(a) case more than a mere threat to competition must be shown in order for the plaintiff to recover damages. The court held that the injury with which §2(a) is concerned must be shown to have actually occurred, and that plaintiff was damaged as a result. The court then correctly concluded that the competition with which §2(a) is concerned is only harmed "to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor." 607 F.2d 1136 (J.A. 7). Finding no such proof in this case, the court reversed and remanded with instructions to enter judgment in favor of Chrysler.

The Fifth Circuit's opinion is not as burdensome and far reaching as petitioner would have this Court think. Nowhere in its opinion did the Fifth Circuit hold that specific lost sales had to be proven or that proof of lost sales is the only means of proving the fact of damage. Nor did the Fifth Circuit hold that proof of injury could not be based on circumstantial evidence. All the court held was that there was not sufficient probative evidence in this case for the jury to infer the necessary antitrust injury or the approximate amount thereof.

Petitioner's brief is replete with assertions of facts for which there is no probative evidence in the record. Because of petitioner's misstatements, an additional recital of what the evidence proved or, more appropriately, failed to prove is necessary.

II. Statement of the Facts.

The retail sales incentive programs challenged by petitioner were programs which were offered by Chrysler to all of its dealers throughout the United States. (Tr. 446, 450-451, 460; J.A. 171-172, 179-180). Such programs are used not only by Chrysler but also by its chief competitors, Ford and General Motors, to stimulate sales.[2] (Tr. 475-476; J.A. 189-190). Under respondent's programs, monetary payments were made to dealers based on their new car retail sales of Chrysler's automobiles. (Tr. 139, 445; J.A. 98, 170). The purpose behind these programs was to stimulate *all* of respondent's dealers to sell more cars, thereby increasing Chrysler's share of the American automobile market. (Tr. 444, 451-452; J.A. 167-168, 176-178).

Payments under the programs were dependent on accomplishments against wholesale and/or retail objectives which Chrysler computed, according to uniform procedures, based on each dealer's market potential and/or prior sales. (Tr. 105-106, 447, 463, 464, 473; J.A. 73-74, 173-174, 181-184, 188-189). Because of the way in which these objectives were computed, each dealer had an equal opportunity to participate in each program and to receive equal payments for comparable performance. (Tr. 447, 460, 473; J.A. 173-174, 179-181, 188-189). While each of the incentive pro-

[2]The recent case of *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980), indicates that foreign manufacturers or distributors also utilize incentive programs. Interestingly, in this case the court held that said programs did not violate §2(a) of the Robinson-Patman Act.

grams involved in this case vary to some degree, the majority may be classified as either a straight retail incentive program or a wholesale-retail incentive program.[3] (Tr. 445; J.A. 169-170).

The straight retail incentive programs were quite simple. Each dealer was assigned a retail sales objective which was nothing other than the number of retail sales made by the dealer during a prior period of time. The dealer was then paid a bonus for each sale in excess of its objective. The amount of the bonus would generally vary depending on the number of sales made in excess of the dealer's objective. For example, if the dealer attained 120% of its objective, it might receive a larger bonus for each sale in excess of its

[3]Respondent offered two other types of bonus programs. These programs were the 5% stock rebate program for 1972 and 1973 model vehicles and the fleet sales incentive programs. Under the 5% stock rebate program, the dealer could receive a refund of 5% of the factory price on each new prior year model vehicle in the dealer's inventory on the announcement day of the new model. (Tr. 65; J.A. 33). However, the 5% stock rebate was only available to dealers not participating in the retail sales incentive program being run at the close of the model year. In both 1972 and 1973, petitioner elected to receive the 5% stock rebate incentive program, rather than to participate in the 1972 Summer Sweepstakes and the 1973 Early Clean Up Bonus. (Tr. 168-171, 178-180; Pt. Ex. 48, 51, Tr. 222-223; J.A. 239, 242). The money received by each of the four Chrysler dealers located in the Birmingham area from the retail sales incentive programs and the alternative 5% stock rebates is set forth in Defendant's Exhibit 28 (Tr. 440; J.A. 267).

Under the fleet sales incentive programs, dealers received monetary payments on their fleet sales. A sale qualified as a fleet sale if it was made to a qualified fleet purchaser (one who generally purchased in large numbers), such as the Alabama Power Company. Since fleet sales were covered by separate programs, they did not count toward a dealer's sales objective under the retail sales incentive programs. (Tr. 77-78, 103-105; J.A. 40-42, 70-72). During the period involved in this case, petitioner worked hard to make fleet sales, and over 24% of its total new car sales were fleet sales. (Tr. 104; J.A. 71; Def. Ex. 31, Tr. 539, J.A. 268). Petitioner received $62,185 under the fleet sales incentive programs while the next highest Chrysler dealer in the Birmingham area received only $7,185. The total fleet incentive money received by each Chrysler dealer in the Birmingham area is set forth in Defendant's Exhibit 27 (Tr. 440; J.A. 266).

objective than it would receive if it sold less than 120% of its objective. Nevertheless, each dealer attaining the same level of achievement against its objective received the same bonus for each sale above its objective. (Tr. 462-464; J.A. 181-184).

Under the wholesale-retail incentive programs, a dealer was required to purchase a certain number of automobiles from respondent in order to qualify to participate in the program. Each individual dealer's purchase objective was determined by use of a standard formula which was uniformly applied to all Chrysler dealers nationwide.[4] If a dealer qualified to participate in the program by purchasing its objective, it then generally received bonus payments on each of its retail sales during the program period. As with the straight retail programs, the amount of the bonus was often based upon the percentage attainment of the dealer's objective. (Tr. 445-447; J.A. 170-174).

Petitioner and all other Chrysler dealers located in the greater Birmingham, Alabama metropolitan area paid the

[4]The standard formula used to compute each dealer's purchase objective gave equal weight to the dealer's rate of sales and to the dealer's market potential. (Tr. 453-454, 460; J.A. 178-181). The dealer's market potential was given effect by using the planning potential number assigned to the dealer by Chrysler. Planning potential represents the number of new units Chrysler felt the dealer should sell based on the dealer's prior rate of sales and the value of its location. (Tr. 298-299, 332-339, 455). The value of the dealer's location was dependent on the number of potential purchasers residing in the area around the dealership and the strength of the dealers of other makes clustered around the Chrysler dealer. (Tr. 296-332). By comparing each individual dealer's retail sales to the total retail sales of all dealers in the dealer's sales region (Chrysler divided the country into 22 sales regions (Tr. 294-295, 446; J.A. 171), one half the formula was derived. The other half of the formula was derived by comparing the dealer's planning potential to the total planning potential for all dealers in the sales region. These two comparisons were expressed in percentage form and were averaged together to derive the percentage of the total purchases assigned to the sales region which each individual dealer in the region would be responsible for purchasing. The dealer's inventory of similar cars was then subtracted from its initial purchase objective to derive the dealer's purchase objective under the program. (Tr. 456-458).

same amount for comparable cars purchased from respondent. (Tr. 15). Hence, there was no price discrimination when cars were initially purchased by the dealers. The alleged price discrimination did not occur until the car was later sold by the dealer during an incentive program. Ironically, it is the individualized objectives – the very thing which equalizes each dealer's opportunity to participate in the programs and to receive equal payment for equivalent performance – which petitioner finds objectionable. Petitioner contends that these objectives resulted in price discrimination since it often had to sell more cars to reach its objective than did other dealers with which petitioner allegedly competed. (Pet. Br. 8 n.5). Petitioner contends that the discrimination is shown by the fact that when the bonus money received is divided by the number of cars sold to receive the bonus, petitioner would often receive less money per unit sold due to its higher objective.[5] Interestingly, under petitioner's theory of discrimination, the large high volume dealerships would always be discriminated against since their objectives would be higher. Petitioner would prefer programs with no objectives or with set objectives whereby the large volume dealers would al-

---

[5]Dr. Ignatin, petitioner's expert, calculated what he contended to be the amount of the discrimination by dividing the bonus money received under a retail incentive program for sales of a particular car line by the number of such cars sold by the dealer during the program period. This gave Dr. Ignatin a figure which he called the "per unit rebate" for that car line. Dr. Ignatin performed this calculation for each car line on which a separate bonus was paid. He then compared the per unit rebate per car line which each dealer in the Birmingham area received under a program. If petitioner did not receive the highest per unit rebate, Dr. Ignatin subtracted petitioner's per unit rebate from the highest per unit rebate received by any dealer and multiplied the difference by the number of cars of that car line which petitioner sold during that program period. Dr. Ignatin contended that this figure represented the amount of the price discrimination resulting from each program. (Tr. 228-229; J.A. 132-134).

ways receive much more money than the smaller dealers. (Tr. 460; J.A. 180-181).

Petitioner contends that during the period involved in this case, it competed for sales with three other Chrysler dealers. These alleged competitors were Roebuck Chrysler-Plymouth, Central Motors, and Hall Motor Company. (Pet. Br. 3 n.1; Tr. 44-45, J.A. 17). Each of these dealerships were located in different sections of the greater Birmingham, Alabama metropolitan area. (Tr. 102-103, J.A. 69; Def. Ex. 24, 25, Tr. 332). Petitioner was located in the central downtown area. (Tr. 103, 305; J.A. 69). Roebuck was located in the northeastern area. (Tr. 103, 305; J.A. 69). Central was located in the western area. (Tr. 103, 305-306; J.A. 69). And at the beginning of the relevant period, Hall Motor Company was located in Bessemer, Alabama, which is in the extreme southwestern part of Jefferson County, Alabama. (Tr. 102, 306; J.A. 69). In May, 1971, Hall moved its location to the more heavily populated Vestavia, Alabama area, which is located due south of Birmingham at the southern edge of Jefferson County. (Tr. 88-89, 90, 319, 699-701; J.A. 48-50). At the end of 1973, Hall went out of business. (Tr. 522). Each of these Chrysler dealerships was surrounded by competing dealers representing other makes of automobiles. (Def. Ex. 24, 25, Tr. 332; Tr. 103, 303-304, 321-322, J.A. 69-70).

Petitioner asserts that competition among the four Chrysler dealers in the greater Birmingham area was exceedingly keen. (Pet. Br. 3). This claim is apparently based on Mr. Payne's hearsay testimony that some customers told him they shopped with the other dealerships, and his statement that competition among the Chrysler dealerships was *rough*. (Tr. 45-48; J.A. 17-23). No probative evidence was ever introduced to give any meaning to Mr. Payne's characterization or to corroborate it in any way. No market surveys

were conducted to show the extent of the competition among the Chrysler dealerships or the sensitivity of customers to price differences.[6] In fact, the evidence in this case indicates that price is not the sole determining factor as to where a customer will purchase. The location of the dealership is also very important in a customer's decision of where to buy since there generally will be an ongoing relationship between the dealer and customer for warranty and other service work. (Tr. 582, 641; J.A. 205).

Petitioner asserts that because of the sales incentive programs the other Chrysler dealers in the Birmingham area were able to undersell it, thereby causing it to lose sales, force business and overallow on used car trade-ins. (Pet. Br. 5, 22). The evidence cited to support these statements (Tr. 55, 65-70, 91-95, 97-100, 124-127, 711; J.A. 29-30, 34-40, 50-57, 60-64, 92-95, 223-225) consists solely of Mr. Payne's bare self-serving allegations to this effect. No evidence of the price that any of the four Chrysler dealers were charging for cars during the period of this suit was offered. No corroborating evidence of lost sales, of forcing business, or of overallowing on trade-ins was offered. No evidence was offered of the approximate profit petitioner allegedly lost from forcing business or overallowing on trade-ins or from lost sales. In fact, Mr. Payne admitted on cross-examination that he did not have any evidence that he had lost sales. (Tr. 93; J.A. 54). He admitted that he did not know what the dealers did with the bonus money after they received it. (Tr. 95; J.A. 57). He indicated that he did not think that the bonus money was passed on to the ultimate consumer in the form of a price reduction. (Tr. 85; J.A. 44). Mr. Payne was not even sure whether he had over-

---

[6]This is exactly the type proof which it appears *amicus curiae* Vanco Beverage, Inc., introduced in its case. *See amicus curiae* brief of Vanco Beverage, Inc., at 26-27.

allowed on trade-ins since he qualified his testimony with the preface that he would *possibly* have to overallow on trade-ins in order to make a deal. (Tr. 55; J.A. 30).

Petitioner's expert witness did not corroborate Mr. Payne's assertions of underselling, lost sales, or forcing business, since Dr. Ignatin merely rendered testimony about the possible effects of the incentive programs. Dr. Ignatin prefaced his testimony in this regard with the qualification that it was based to some degree on speculation. (Tr. 202; J.A. 100). He did not give any specific testimony concerning lost sales or profits lost from forcing business or overallowing on trade-ins. He even admitted on cross-examination that he did not have any evidence that any of the Chrysler dealers in the Birmingham area had discounted their prices below petitioner's price because of the incentive programs. (Tr. 255-256; J.A. 135).

Moreover, the statistical evidence in this case disproves Mr. Payne's assertions of lost sales, forcing business or overallowing on trade-ins. In fact, this evidence shows that there was not extensive or keen competition among the four Chrysler dealers. This is evident from a comparison of the new car retail sales and the average gross profit per sale:[7]

---

[7]The average gross profit figures in this table represent the average profit realized per retail sale for each dealer for the calendar years 1971, 1972 and 1973. It is simply the difference between what was realized from all retail sales and the cost of such sales. Included in the amount realized from such sales is all incentive money received during the calendar year. Included in the cost of sales figure is the cost of the vehicles, salesmen's commissions, and dealer preparation costs. The difference between these two figures was divided by the number of new car sales for the year to get the average gross profit per sale. (Tr. 526-528; J.A. 190-193).

DEALER COMPARISON[8]

Year	J. Truett Payne Co. Retail Sales	% of Chr. Market	Average Gross Profit	Hall Motor Retail Sales	% of Chr. Market	Average Gross Profit
1970	409	24%	—	262	15%	—
1971	562	27%	390	362	17%	385
1972	576	23%	425	568	23%	435
1973	562	25%	435	549	24%	361

Year	Roebuck Retail Sales	% of Chr. Market	Average Gross Profit	Central Retail Sales	% of Chr. Market	Average Gross Profit
1970	537	32%	—	490	29%	—
1971	688	33%	335	467	23%	311
1972	765	31%	342	588	23%	372
1973	753	33%	380	399	18%	392

This comparison shows that petitioner was not losing sales to other Chrysler dealers[9] and was not forcing business or overallowing on trade-ins since its average gross profit per new retail sale was generally higher than that of the other three dealers. This is not what would be expected if there

[8]The figures in this table were taken from Defendant's Exhibit 31 (J.A. 268-269; Tr. 539) and from Plaintiff's Exhibit 17, 22, 27 and 32 (Tr. 71, 132-133).

[9]Petitioner contends that its 4% drop in market share in 1972 demonstrates sales lost as a result of the incentive programs. There is no evidence in the record from which this connection can be drawn. Instead of losing sales in 1972, petitioner's number of sales increased. Its drop in market share was merely the result of Hall Motor Company's May, 1971 move of its dealership from the weak Bessemer market area to the heavily populated Vestavia area. The total sales made by Vestavia drastically improved after the move. Since the other Chrysler dealers did not show a drop in sales after this move, it is apparent that Hall was making sales to customers who had not previously been Chrysler customers. This conclusion is confirmed by the fact that total new retail sales of the four Chrysler dealers increased from 1,698 sales in 1970, to 2,079 sales in 1971, to 2,494 sales in 1972.

was keen price competition among the dealers which was affected by the sales incentive programs.

As demonstrated by Defendant's Exhibit 31 (J.A. 269, Tr. 539), petitioner's new car operation, the only part of its business which could be affected by the sales incentive programs, was doing well in comparison with the other dealers. Petitioner's problems resulted from its poor used car operation[10] as well as from its weak service and parts department. (Tr. 538-539, 587, 591, 599; J.A. 195-196, 206-207, 211-212, 215).

An analysis of the incentive programs demonstrates that the programs had no significant impact on what competition there may have been among the four Chrysler dealers. (Pt. Ex. 37-54, Tr. 222-223, J.A. 228-245). First, each program only lasted a few months. Second, even under the petitioner's method of calculating the alleged amount of the discrimination, the difference between what the best performing dealer and what the worst performing dealer received per unit sold was generally quite small. There was no evidence introduced to show that if such a difference was reflected in a resale price reduction, or if other competitive use was made of the difference, it would have the effect of diverting business to the so-called favored dealer. Finally, because of the very nature of the programs,

[10]Petitioner suggests that its low profit margin on its used car sales demonstrates that it was overallowing on trade-ins. (Pet. Br. 16 n.7). However, petitioner never introduced any evidence to make this connection. The low profit margin could only be reflective of an overallowance if petitioner entered the trade-in on its books at its inflated value. Petitioner never proved whether the value entered on the books was at the inflated or real value. In fact, since an overallowance on a trade-in is nothing other than a reduction of the sales price of the new car, logic suggests that any overallowance would be reflected in the new car gross profit rather than in the used car gross. This conclusion would be consistent with Mr. Payne's testimony that the reason for the low profit on the used cars was the fact that he was wholesaling a large number of used cars. (Tr. 98-100, J.A. 61-64; Def. Ex. 1 at 77-83, Tr. 122, J.A. 260-264).

the so-called price advantage constantly shifted among all four of the Chrysler dealers. The inherent fairness of the programs is demonstrated by the fact that over the period involved in this litigation, the average difference between what the best performing dealer and the worst performing dealer received under the combined programs was only *eleven dollars* per car. (Tr. 580-582, Def. Ex. 37, Tr. 613; J.A. 202-205, 271).

It was on this set of facts that the Fifth Circuit based its opinion that respondent had not adequately proved that it had in fact suffered antitrust injury or the amount of such damages.

SUMMARY OF THE ARGUMENT

Proof of a violation of §2(a) of the Robinson-Patman Act, 15 U.S.C.A. §13(a), is not sufficient in and of itself to authorize recovery of treble damages under §4 of the Clayton Act, 15 U.S.C.A. §15, since §2(a) is an incipiency statute designed to arrest certain price discriminations before they can work their evil. When dealing with such a prophylactic measure, it is incumbent on the plaintiff to prove, in addition to a violation of the statute, that it did *in fact* suffer *antitrust* injury as a proximate result of said violation and to provide a reasonable measurement of the amount of said injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Since the evil §2(a) was designed to prevent was the favored competitor *drawing* sales or profits away from its disfavored competitor through competitive use of its price advantage, it is incumbent on the plaintiff to prove that it did lose sales or had profits drawn from it because of the illegal price discrimination in order to recover damages under §4.

In this case, petitioner not only failed to prove a violation of §2(a) of the Robinson-Patman Act, but it (1) failed

to prove that it had in fact suffered the type antitrust injury §2 (a) was designed to prevent and (2) did not provide any reasonable measurement of the amount of such injury. Petitioner did not prove that it had lost any sales because of Chrysler's sales incentive programs, or that it had been forced to lower its sales price to compete with the allegedly favored dealers, or that it had to make other expenditures to remain competitive with the so-called favored dealers. Mr. Payne's uncorroborated, bare assertions that the programs did have such an effect was not sufficient to allow the issue to go to the jury. Petitioner simply failed to prove that it was worse off because a competitor purchased cars from Chrysler at a lower price.

The Fifth Circuit correctly rejected petitioner's contention that proof of antitrust injury was not necessary since it was entitled to automatically recover the amount of the price discrimination upon mere proof of a violation of §2 (a). This "automatic damage" theory, as it has come to be called, is in conflict with the requirements of §4 of the Clayton Act, is in conflict with well established antitrust principles and policies, has been explicitly rejected by Congress, and has been rejected by the overwhelming majority of courts that have considered it.

Moreover, what the petitioner contends represents the amount of the alleged price discrimination in this case in no way reflects antitrust injury, since petitioner's method of calculating the amount of the alleged discrimination is based on the erroneous assumption that the more cars petitioner sells, the worse off it is. Obviously, the more sales a dealer makes, the less it could be injured by a price discrimination. Additionally, petitioner's going concern or goodwill value testimony does not support the jury's verdict since petitioner failed to establish that the sales incentive programs were a material cause of it going out of busi-

ness and since such calculations were based on nothing more than speculation and invalid assumptions.

For these reasons, the Fifth Circuit was correct in reversing the judgment of the lower court and directing judgment to be entered in favor of Chrysler.

ARGUMENT

I. The Fifth Circuit's Decision Is Clearly Correct and Is in Accord With this Court's Requirements for Recovery of Treble Damages.

This case concerns the interrelationship of the price discrimination and the private treble damage provisions of the Clayton Act. 15 U.S.C.A. §§2 (a), 4. The Fifth Circuit correctly defined this interrelationship by holding that in order to recover treble damages under §4 of the Clayton Act for a violation of §2 (a), a plaintiff must, as in any other antitrust case, prove: (1) a violation of the antitrust law, (2) that it *in fact* suffered antitrust injury as a result of said violation, and (3) the approximate amount of said antitrust damage. 607 F.2d at 1135 (J.A. 4). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). The court held that to prove the fact of antitrust injury, petitioner could not rest upon a mere showing of a price differential which might tend to injure competition at its level of distribution (proof of violation of §2 (a)), but had to go forward and demonstrate that such injury did in fact occur by showing that as a result of the discriminatory price difference, a favored competitor was able to *draw* sales or profits from it. 607 F.2d at 1136 (J.A. 7). Finding no probative evidence in the record that petitioner had lost sales or had had profits drawn from it by having to lower its price or by having to take other competitive action to

compete with a favored competitor, the Fifth Circuit correctly reversed and remanded with directions to enter judgment in favor of Chrysler.

Recognizing its failure to prove such lost profits, petitioner seeks to avoid its failure of proof by urging this Court to adopt the "automatic damage" theory espoused by Judge Harvey Johnsen in *Fowler Mgf. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). Under this theory, the plaintiff need not prove that it suffered any actual injury to its business to recover damages since it is automatically entitled to recover the amount of the price differential upon a showing of a violation of §2(a). Petitioner seeks to bolster its automatic damage theory with reference to *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) and its progeny, since these FTC cases suggest that the price differential does not have to be actually used to the competitive advantage of the favored competitor in order for there to be a violation of §2(a).

Morton Salt and its progeny do not support petitioner's position since these cases do not involve §4 of the Clayton Act. Instead, they are merely concerned with the quantum of proof necessary under §2(a) to support a FTC cease and desist order. Not only is a cease and desist order a much less severe remedy than treble damages, but in order to obtain such an order it is only necessary to prove that injury to competition *may* result from the price differential (an incipiency standard). Further, the applicability of *Morton Salt* and its progeny to a private action for any purpose is questionable since the underlying theme of all these cases seems to be a deference by the courts to the expertise of the FTC. 334 U.S. at 54; *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680-81 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). In a private action neither the parties, the court,

nor the jury is cloaked with the presumption of expertise accorded the FTC.

Moreover, the automatic damage theory is in direct conflict with this Court's unanimous decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra. Brunswick* is particularly analogous to this case since there the Court was concerned with what proof was necessary to authorize recovery of treble damages for a violation of §7 of the Clayton Act, 15 U.S.C.A. §18. Section 7, like §2 (a), is a prophylactic statute which is violated merely upon a showing that the effect of the merger *may be* to substantially lessen competition. In holding that mere proof of a violation of the incipiency standard was not sufficient to authorize recovery of treble damages under §4, this Court stated:

> "It [§ 7 of the Clayton Act] is, as we have observed many times, a prophylatic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil. . . .' [Citations omitted.]
>
> "Section 4, in contrast, is in essence a remedial provision. It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . .' * * * It nevertheless is true that the treble-damages provision, which makes awards available *only to injured parties,* and measures the awards by a multiple of the *injury actually proved,* is designed primarily as a remedy.
>
> "Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result."

Id. at 485-86. (Emphasis Added). The Court went on to explain what the plaintiff had to prove to recover damages.

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'"

Id. at 489. Thus, to recover treble damages for a §2(a) violation, the plaintiff must prove not only that the price differential may tend to substantially lessen competition at its level of distribution, but that the price difference did in fact so lessen competition and that it was injured as a result.

The competitive injury with which §2(a) is concerned can best be understood by examining the circumstances which resulted in the Robinson-Patman Act. In the years prior to its enactment, the American system of distribution had undergone marked changes because of the rapid growth of chain stores. Between 1926 and 1937, chain stores had nearly tripled their share of total retail sales, going from nine to twenty-five percent. This growth was at the expense of the independent retailer who could not meet the low prices of the chain stores. An FTC investigation revealed that the lower prices of the chain stores resulted not only from operating economies but also from purchasing advantages consisting primarily of special discounts not available to independent retailers.[11]

---

[11]Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1062, 1065-66. *See, FTC, Final Report on the Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess., 29-30, 57-63, 85-87 (1935).

In an effort to end the price preferences and other concessions given the chain stores which enabled them to undersell or otherwise draw customers and profits away from the independents, Congress passed the Robinson-Patman Act.[12] Among other things, the Act prohibited certain price discrimination.[13] Congress made the conscious decision not to prohibit all price discrimination but only discriminations which might have the evil affect on competition with which Congress was concerned — that is discrimination which allows the favored competitor to draw sales or profits away from its disfavored competitors.[14]

Thus, under *Brunswick*, in order to recover treble damage for a violation of §2 (a), the plaintiff must prove that as a proximate consequence of the discrimination it lost business to the favored competitor, or lost profits by having to lower its resale price, or was required to take other steps to meet the competition of the favored competitor. This is the type of injury §2 (a) was designed to prevent. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Colum. L. Rev. 979, 992-93 (1977). Since petitioner failed to prove any such antitrust injury, much less the amount thereof, the Fifth Circuit's opinion is correct and should be affirmed.

---

[12]Rowe, *supra*, note 11 at 1067-74.

[13]Section 2 (a), 15 U.S.C.A. § 13 (a).

[14]Section 2 (a) of the Robinson-Patman Act only prohibits price discrimination:

> . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . .

It is significant that this limitation was not included in the Patman bill as originally introduced in the House of Representatives or in the Robinson bill as introduced in the Senate. H.R. 8442, 74th Cong., 1st Sess. (June 11, 1935); S. 3154, 74th Cong., 1st Sess. (June 26, 1935). Both bills prohibited price discrimination irrespective of its likely impact on competition.

II. The Legislative History of the Robinson-Patman Act Supports the Fifth Circuit's Opinion and Compels Rejection of the Automatic Damage Theory.

Not surprisingly, petitioner ignores the legislative history of the Robinson-Patman Act, undoubtedly because Congress specifically considered a presumptive damage provision, identical to petitioner's automatic damage theory, and rejected it.

Both the Patman bill (H.R. 8442) as introduced in the House and the Robinson Bill (S. 3154) as introduced in the Senate provided that as a minimum a plaintiff would be entitled to recover the amount of the illegal price discrimination.[15] The presumptive damage provision encountered strong opposition. In an effort to save the provision, Mr. H. B. Teegarden, the acknowledged author of the Patman and Robinson bills,[16] added the limiting phrase "where the fact of damage is shown." Mr. Teegarden explained that this addition was made to limit the application of the presumptive damages provision to a situation where the fact of

---

[15]The Robinson and Patman bills as introduced were identical and with regard to damages provided:

> Section 2 (d). For purposes of suit under section 4 of this Act, the measure of damage from any violation of this section shall, in the absence of proof of greater damage, be presumed to be the unit amount of the prohibited discrimination, payment, or grant concerned, multiplied by— (1) the volume of business involved in such violation in case the plaintiff shall be in competition with the grantor therein in the distribution of the products or commodities concerned; and (2) the volume of plaintiff's business in the respective products and commodities, and for the period of time concerned in such violation, in case the plaintiff shall be in competition with the grantee therein, or, in cases under paragraph (b) of this section, in competition with the intermediary or with the person for or under whose control such intermediary shall act therein.

H.R. 8442 (June 11, 1935) and S. 3154 (June 26, 1935), 74th Cong., 1st Sess. (1935).

[16]*Hearings on H.R. 8442, et al., before the Comm. of the Judiciary House of Representatives*, 74th Cong., 1st Sess. Ser. 10, pt. 1, at 9 (1935) (hereinafter referred to as "*House Hearings*"); Rowe, *supra*, note 11, at 1067.

injury had been proven but the amount of the damage was uncertain.[17] When questioned as to how the fact of the damage would be proven, Mr. Teegarden indicated that it would be necessary to show a loss of customers to the favored competitor because of a lower price made possible by the discrimination. *Hearings on H.R. 8442, et al., before the Comm. of the Judiciary House of Representatives,* 74th Cong., 1st Sess., Ser. 10, pt. 1, at 220 (1935) (hereinafter referred to as *"House Hearings"*).

Despite Teegarden's efforts to save the presumptive damage provision, the House Judiciary Committee eliminated it from the bill which it reported to the House. *H.R. Rep. No.* 2287, 74th Cong., 2d Sess. (1936). No amendments were added on the floor and the House passed the bill without any presumptive damage provision. 80 *Cong. Rec.* 8242 (1936).

The Senate Judiciary Committee accepted §2 (d) as modified by Mr. Teegarden and included the provision in the Robinson bill reported to the Senate. *S. Rep. No.* 1502, 74th Cong., 2d Sess. (1936). In fact, the Committee attached great importance to §2 (d) as being a new remedy to assist in the enforcement of the Act.[18] The Senate in-

---

[17]Mr. Teegarden explained the addition as follows:

"And I am free to say that I think there were deficiencies in section (d) as first drawn. Further study of them has revealed them to me and for that reason I have submitted this revision to the committee for its consideration.

(d) *For purposes of suit under section 4 of this act, the measure of damages for any violation of this section shall* –

And that includes A, B, and C, of course –

where the fact of damage is shown –

It requires the fact of damage to be shown. It does not throw the door open for any one to come in and sue in a penal capacity for damages whenever there is a violation. He must show enough to show that he is in some way damaged–"

[18]Concerning the need for the presumptive damage provision, the Committee noted:

cluded the presumptive measure of damage provision in the Robinson bill which because of floor amendments was redesignated as §2 (e) at the time it was passed. 80 *Cong. Rec.* 6436 (1936).

The differences in the bills passed by the House and Senate were resolved in the Conference Committee. The presumptive damage provision was deleted from the bill reported out of the Conference Committee. In explaining this deletion the Committee Report stated:

> "Subsection (e) of the Senate bill set up a *new measure of damages* for violations of the law, whereas the House bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded."

H.R. Conference Rep. No. 2951, 74th Cong., 2d Sess. 8 (1936). (Emphasis added).

Petitioner seeks to avoid the effects of the unambiguous legislative history by suggesting that Congress eliminated the presumptive damage provision from the Senate bill

---

"Section (d) represents a revision, approved by your committee, of the corresponding part of the bill as referred. It states a presumptive rule for the measurement of damages in private suits for violation, which are authorized by section 4 of the Clayton Act. As the practices against which this bill is directed are injurious not only to the public interest, but as well to the private parties victimized by them; as, in fact, they work their public injury only through their power to damage private competitors, your committee feels strongly that every reasonable facility should be afforded the latter to enable them to recover the damages they have suffered, and thus also to induce their active vigilance in enforcing the act, relieving the Government correspondingly of the burden of its cost. Private remedies in damages for violations of antitrust law have been authorized since its first enactment; but their use has been much impeded, due partly to the speculative character of damages based on loss of business, and to the limited facilities of private parties for obtaining evidence of a kind to satisfy the narrower requirements of the common law, to which such suits were unknown."

Senate Comm. on the Judiciary, S. Rep. No. 1502, 74th Cong. 2d Sess. 8 (1936).

for fear that it would have limited the damages recoverable for a violation of the Act. (Pet. Br. 30-31). Petitioner cites no legislative history to support this contention. There is none. To the contrary, the legislative history clearly demonstrates that this was not the reason the presumptive damage provision was rejected since the presumptive damage provision included in the original Robinson and Patman bills and in the Robinson bill as passed by the Senate included the phrase "in the absence of proof of greater damage." This phrase was obviously included to make it clear that the presumption would not prevent the recovery of any greater damages which could be proved. Moreover, Mr. Teegarden in explaining the presumptive damage provision to the House Judiciary Committee stated: "We have attempted to make some approach to the problem in section (d) by providing a presumptive measure of damages, leaving freedom to prove larger damages, if larger damages can actually be shown." *House Hearings* at 219. *See also,* 80 *Cong. Rec.* 6348 (1936) (Senator Robinson).

Petitioner's reliance on language in *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751 (1947), to support its view of the legislative history is misplaced. (Pet. Br. 30, 31). This language can only make sense if examined in context. In context, all Mr. Justice Jackson said was that the Robinson-Patman Act could not be used to void a contract because Congress never considered such a remedy. Mr. Justice Jackson was underscoring that Congress by amending the Clayton Act in 1936 did not intend to add any new remedies to those already provided by §4 of the Clayton Act, and, therefore, it would be inappropriate for the Court to legislate such a remedy.

Moreover, Petitioner's plea that automatic damages in the amount of the price discrimination ought to be allowed

because proof of lost sales and profits is too great a burden to place on a private plaintiff was specifically considered and rejected by Congress. During the course of the House Hearings Mr. Teegarden, in urging the adoption of the presumptive damage provision, specifically highlighted the difficulty of proving actual business loss.[19] Representative Patman also urged adoption of the presumptive damage provision due to the difficulty of proving actual damages.[20] Senator Robinson, during the floor debate on S. 3154, likewise urged the adoption of the presumptive damage provision of S. 3154 because of the difficulty of proving actual damages under §4 of the Clayton Act. Senator Robinson specifically noted that the presumptive damage provision

---

[19]Mr. Teegarden stated:

"Now, a similar section is included in the Sherman Act, as a matter of fact. But, in spite of that, suits for civil damages, for violations of the act, have been few, because of the difficulty of obtaining evidence, a difficulty which has been heightened by the comparative indefiniteness of the prohibitions contained in the act, and also by the difficulty of proving specific damages to the competitor.

"In other words, it is hard for the competitor to say, 'Well, if it had not been for us I would have had so much business." It is hard to prove that the decrease in business is due to the violation complained of."

House Hearings at 219. *See also House Hearings* at 227.

[20]Representative Patman stated:

"The other provision is about treble damages. The bill here proposed, H.R. 8442, has a provision about treble damages. The present law, as I understand it, is ineffective. In the first place, in order to get up the information upon which to base a cause of action against monopoly for destroying your business unfairly and illegally, you would have to have not only a good force of investigators, which would cost you a lot of money, but it would also take a host of fortune tellers and clairvoyants to find out what the other fellow has been doing, and what he expects to do, in order to make your case. It is absolutely impossible, or at least, almost impossible, under the existing law to prove your damage.

"Now, under the provisions of the bill that we have, there are treble damages provided, and the damages can be easily proved. I think that should remain in the bill, because that is one of the best parts of the law. . . ."

House Hearings, 74th Cong., 2nd Sess., Ser. 10, pt. 2, at 395-96 (1936).

was needed since there was no such presumptive provisions under §4 of the Clayton Act.[21] 80 *Cong. Rec.* 6348 (1936) (Senator Robinson). *See also, S. Rep. No.* 1502, 74th Cong., 2d Sess. 1-8 (1936).

Congress was well aware that it might be difficult for private plaintiffs to recover damages actually caused by price discriminations. Nevertheless, it chose not to alter the requirements of §4 of the Clayton Act for recovering damages. Congress concluded that the recovery of triple damages and costs was incentive enough to encourage private enforcement of the Robinson-Patman Act.[22]

Since Congress rejected the effort to change the law to incorporate automatic damages, it is important to review the case law extant at the time. The only case law discussing damages in a secondary-line price discrimination context in existence when the Robinson-Patman Act was passed was this Court's decision in *ICC v. United States ex rel. Campbell,* 289 U.S. 385 (1933), and the Seventh Circuit's decision in *American Can Co. v. Ladoga Canning Co.,* 44 F.2d 763 (7th Cir. 1930).

While *ICC v. United States ex rel. Campbell, supra,* deals with rate discrimination under the Interstate Com-

---

[21]Senator Robinson on the floor of the Senate stated:

> The remedy under the Clayton Act is that contained in Section 4, which gives the party injured by reason of the unfair price discrimination the right to bring a suit to recover damages.
>
> The remedy, of course, without some special provision as that found in the pending bill, [S. 3154], is inadequate. There is no presumption in section 4 of the Clayton Act of which the complainant may take advantage. The difficulty of establishing his case is often insurmountable.

80 *Cong. Rec.* 6348 (1936) (Senator Robinson).

[22]This conclusion is buttressed by the legislative history of the treble damage provision of the original Sherman Act and of § 4 of the Clayton Act. 21 Cong. Rec. 2456 (1890) (Senator Sherman); 51 Cong. Rec. 16274-16275 (1914) (Rep. Webb), 16317-16319 (Rep. Floyd); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486, n. 10 (1977).

merce Act,[23] Mr. Justice Cardozo's reasoning is equally applicable to a secondary-line price discrimination case. *Enterprise Industries v. Texas Co.*, 240 F.2d 457, 459-60 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Mr. Justice Cardozo held that the difference in one rate (price) and another is not the measure of damage suffered by the discrimination since such would only measure how much better off the disfavored shipper (purchaser) would have been if it had paid less and would not measure how much worse off it was because a competitor paid less. Accordingly, Mr. Justice Cardozo held that the measure of damage resulting from discrimination was the profits lost by the disfavored shipper (purchaser) from lost sales or from having to lower its resale price to compete with the favored shipper (purchaser). 289 U.S. at 389-91.

In *American Can Co. v. Ladoga Canning Co., supra,* the Seventh Circuit affirmed a jury award because the plaintiff proved that it lost sales to a favored competitor who was underselling it due to an illegal price discrimination and offered reasonable proof of the amount of said damage.

In view of this clear legislative history of unsuccessful legislative attempts to include automatic damages as a remedy for a §2(a) violation, this Court should also reject petitioner's attempt to amend the Act in a manner clearly at odds with congressional intent. This Court should

---

[23]It is clear from the legislative history that § 2(a) price discrimination was intended to be analogous to discriminatory rates proscribed by the Interstate Commerce Act. Rep. Patman in his remarks before the House Judiciary Committee advocating H.R. 8442 stated:

> We need a law, a specific law. It could be enforced exactly as the Interstate Commerce Act is enforced against the railroads.

House Hearings at 193-194. And Mr. Teegarden, author of H.R. 8442, analogized H.R. 8442 to the Interstate Commerce Act as follows:

> [But] I think the idea of discrimination is the same in both situations. I framed it that way, on that assumption.

House Hearings at 212-213.

not undertake to supply something that Congress has studiously omitted. Here, Congress has done more than merely acquiesce through silence and "positive inaction" but has affirmatively rejected the very concept which petitioner seeks to have the Court judicially legislate. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). This Court, as it has recognized many times, cannot judicially expand legislation in a manner contrary to the manifest intent of Congress. Petitioner's attempt, in this forum, to have the Robinson-Patman and Clayton Acts rewritten must be rejected. *Great Atlantic and Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Gulf Oil Corp. v. Copp Paving Co., supra*; *Blue Chip Stamps v. Mano Drug Stores*, 421 U.S. 723, 731-34 (1975); *Flood v. Kuhn*, 407 U.S. 258 (1972); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *FTC v. Bunte Bros.*, 312 U.S. 349 (1940).

III. The Automatic Damage Theory Has Been Rejected by the Overwhelming Majority of Courts.

This Court has never considered the question of whether damages may be automatically recovered in the amount of the illegal price discrimination merely upon a showing of a violation of the Robinson-Patman Act. While this theory received some acceptance in §§2(d) and (e) cases shortly after passage of the Act, it seems clear that all Circuits which have considered the question have now rejected automatic damages as a viable damage theory in §2(a) cases.

The leading case discussing the damages recoverable for a §2(a) Robinson-Patman violation is the Second Circuit cases of *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). In a well reasoned opinion by Judge Learned Hand, the Second Circuit reversed the district court's award of "automatic" dam-

ages in the amount of the price discrimination since neither the fact of damage nor the amount thereof was proven. The court correctly held that the plaintiff had to prove a diversion of customers or other actual competitive injury resulting from the price discrimination to recover damages. The court stated that a showing of illegal price discrimination was not sufficient in and of itself to authorize the recovery of damages.

Judge Hand based his opinion on the clear legislative history and on this Court's decision in the analogous case of *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933). In the *Campbell* case, Mr. Justice Cardozo, writing for the Court, stated:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .
>
> "Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When that rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. . . . But a different measure of recovery is applicable where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less. . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less. . . . *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*
>
> ". . . If by reason of the discrimination the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage

> has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Id. at 389-91. (Emphasis added).[24]

The inherent logic of *Enterprise* has made it the landmark case rejecting the automatic damage theory of recovery in Robinson-Patman Act cases. Its lead has been followed by the overwhelming majority of District and Circuit Courts which have considered the question of automatic damages in Robinson-Patman actions.[25]

---

[24]Petitioner's attempt to distinguish *ICC v. United States ex rel. Campbell, supra,* on the basis that it is a discriminatory rate case totally ignores the legislative history of the Robinson-Patman Act. *See, supra,* n. 23. Petitioner's reliance on *City of Mishowaka v. American Electrical Power Co.,* 465 F.Supp. 1320, 1340 (N.D. Ill. 1979) to support its position (Pet. Br. 34-35) is misplaced since the Seventh Circuit has now reversed the District Court. *Id.,* 616 F.2d 976 (7th Cir. 1980).

[25]The following cases either cite *Enterprise* as controlling, or have come to similar conclusions in rejecting the automatic damage concept and requiring plaintiffs to prove actual injury in order to recover treble damages:

Second Circuit -- *Interstate Cigar Co. v. Sterling Drug, Inc.,* 1980-2 Trade Cases ¶63,430 (S.D.N.Y. 1980); *Uniroyal, Inc. v. Jetco Auto Service, Inc.,* 461 F.Supp. 350 (S.D.N.Y. 1978); *Berkey Photo, Inc. v. Eastman Kodak Co.,* 457 F.Supp. 404 (S.D.N.Y. 1978), *modified on other grounds,* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* ..... U.S. ....., 62 L.Ed.2d 783 (1980); *Lombino & Sons, Inc. v. Standard Fruit and Steamship Co.,* 1975-2 Trade Cases ¶60,527 (S.D.N.Y. 1975); *Krieger v. Texaco, Inc.,* 373 F.Supp. 108 (W.D.N.Y. 1973); *Guyott Co. v. Texaco, Inc.,* 261 F.Supp. 942, (D.Conn. 1966); *Sano Petroleum Corp. v. American Oil Co.,* 187 F.Supp. 345 (E.D. N.Y. 1960);

Third Circuit – *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 478 F.Supp. 243 (E.D.Pa. 1979) *aff'd,* 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980) (wherein both the District Court and the Third Circuit cited *Enterprise* as the rule in the Third Circuit); *Kelly v. General Motors Corp.,* 425 F.Supp. 13 (E.D.Pa. 1976); *Freedman v. Philadelphia Terminals Auction Co.,* 197 F.Supp. 849 (E.D.Pa. 1961), *aff'd,* 301 F.2d 830 (3d Cir.), *cert. denied,* 371 U.S. 829 (1962) (a § 2(c) case where both the

In contrast, petitioner and the *amici curiae* cite only six cases which they argue support the automatic damage theory. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *State Wholesale Grocers v. Great Atlantic and Pacific Tea Company*, 202 F.Supp. 768 (N.D. Ill. 1961); *Becker-Lehmann, Inc. v. Firestone Tire and Rubber Co.*, 202 F.Supp. 514 (E.D. Mo. 1959). Of these, only *Fowler* is a pure §2(a) case. *Bruce's Juices* is a contract case; *Grace* is a §2(c) case; and *Elizabeth Arden* and *State Wholesale* are §§2(d) and (e) cases. In §§2(c), (d), and (e) cases, 15 U.S.C.A. §§13(c), (d), (e), as distinguished from §2(a) cases, 15 U.S.C.A. §13(a), there is no requirement that the action challenged must threaten competition in order to establish a violation. *Becker* is of little help to petitioner since it involves §§2

District and Circuit Courts rejected plaintiff's contention that it was automatically entitled to recover the amount of the illegal brokerage fee);

Fourth Circuit – *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962) *cert. denied*, 372 U.S. 970 (1963) (a §§ 2(d) and (e) case which cited *Enterprise*);

Fifth Circuit – *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted*, ... U.S. ....., 66 L.Ed.2d 20 (1980); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D.Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); *Alexander v. Texas Co.*, 165 F.Supp 53, 57-58 (W.D. La. 1958);

Sixth Circuit – *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961);

Eighth Circuit – *American Can Co. v. Russellville Canning Co.*, 191 F2d 38 (8th Cir. 1951); *Zwicker v. J.I. Case Co.*, 596 F.2d 305 (8th Cir. 1979); *Baxter Imports, Inc v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D.Minn. 1980) (a case involving sales incentive programs similar to those involved in this case);

Ninth Circuit – *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980); *Youngston v. Tidewater Oil Co.*, 166 F.Supp. 146 (D.Ore. 1958).

(a), (d) and (e), and the court merely held that defendant was not entitled to a summary judgment. This leaves only *Fowler* to support the petitioner's theory.

Fowler Mfg. Co. v. Gorlick, supra, is an anomaly. The decision conflicts with the legislative history of §2 (a), the overwhelming case law, and §4 of the Clayton Act. The author of the opinion, Judge Harvey M. Johnsen, a Senior Circuit Judge of the Eighth Circuit sitting by designation, paid no attention whatsoever to the requirements of §4. Instead, Judge Johnsen simply allowed the plaintiff to infer its way to a treble damage recovery merely by showing a price differential. Judge Johnsen stated:

> "... the right of a court to grant a general damage award under the Robinson-Patman Act for the amount of an illegal difference in prices and allowances does not depend upon its having been evidentially established, and the court's being able to find on the basis thereof, that a lessening of competition has in fact occurred, and that the extent of the injury occasioned thereby in the particular situation corresponds to the amount of the discrimination. The Act permits recovery of the amount of a discrimination in prices and allowances without the necessity of any such specific proof or finding as a basis therefor."

415 F.2d at 1253. This language, on its face, conflicts with this Court's decision in *Perkins v. Standard Oil Co.,* 395 U.S. 642, 648 (1969), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

Judge Johnsen based his opinion on dictum from *Bruce's Juices Inc. v. American Can Co.,* 330 U.S. 743, 757 (1947), on his prior opinion in *Elizabeth Arden Sales Corp. v. Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945) (a §§2 (d) and (e) case), and on his view that automatic damages were necessary to encourage private

enforcement of the Robinson-Patman Act. Indeed, if the rule of damage espoused by Judge Johnsen in *Fowler* is adopted by this Court it would unquestionably spawn a massive increase in Robinson-Patman suits, since arguably, under *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), plaintiffs would only have to show a price differential to have a chance to recover treble damages and costs. Such a situation would encourage harassment and racketeering suits, a problem about which Congress has already expressed concern.[26] This can only be avoided by limiting the recovery of damages to those who can prove actual antitrust injury and the amount thereof.

Judge Johnsen's reliance on his *Elizabeth Arden* decision is misplaced since that was a §§2 (d) and (e) case. Sections 2 (d) and (e) are only concerned with competitors, not competition. On the other hand, §2 (a) is concerned with competition at various levels of distribution and not with competitors *per se*. *American Oil Co. v. FTC*, 325 F.2d 101, 104-105 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Standard Motor Products, Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959). The importance of this difference was recognized in *State Wholesale Grocers v. Great Atlantic and Pacific Tea Co., supra*, at 776 (a §2 (d) case) wherein the court stated that to require the plaintiff to show a loss of business in order to establish the fact of damage would be to require it to meet the injury to competition requirements of §2 (a).

Moreover, in *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), the Eighth Circuit re-

---

[26]*See, Hearings on H.R. 4597 Before Subcomm. 3 of the Comm. on the Judiciary*, 83d Con. 1st Sess., Ser. 8 pt. 1, at 12 (1953); *Report of Nixon Task Force on Productivity and Competition*, ATRR, No. 413, X-7 (June 10, 1969), and Note, *Private Recovery Under the Robinson-Patman Act: Confusion in the Courts on the Proper Measure of Damages*, 21 Syracuse L. Rev. 941, 953 (1970).

fused to apply Judge Johnsen's automatic damage concept in a §2 (a) case, even though the court held that a violation of §2 (a) had been proved. The Eighth Circuit reversed the District Court's award of damages in the amount of the price discrimination, and stated:

> "It is our understanding that, in order for a plaintiff to recover damages in a case such as this [§ 2 (a)], it is not enough to show that a defendant was guilty of price discrimination which might lessen or injure competition, but it is also necessary for the plaintiff to prove that the wrong done proximately resulted in ascertainable damages to its business and property."

Id. at 54.

Russellville has been widely cited as overruling Judge Johnsen's *Elizabeth Arden* decision. *See, e.g., Enterprise Industries, Inc. v. Texas Co., supra; Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1080 (1957). This certainly appears to be the case, since in *Russellville*, the Eighth Circuit cited *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949) as support for its decision. 191 F.2d at 56. *Sun Cosmetic* is a §§2 (d) and (e) case based on facts virtually identical to those in *Elizabeth Arden*. However, the Second Circuit, in an opinion written by Judge Learned Hand, rejected the theory of recovery applied in *Elizabeth Arden* and held that to recover treble damages the plaintiff had to prove a diversion of business and the amount of the loss caused thereby. Judge Johnsen obviously recognized that *Russellville* was inconsistent with his *Elizabeth Arden* opinion since he was on the panel in *Russellville* and dissented.

Recent Eighth Circuit cases confirm that Judge Johnsen's automatic damage theory is not applicable in §2(a) cases in that Circuit. *Zwicker v. J. I. Case Co.*, 596 F.2d 305 (8th Cir. 1979) (a §2(a) case where illegal price discrimination was proved, but automatic damages were not allowed); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). *See also, Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶63,367 (D. Minn. 1980) (a §2(a) case involving automobile sales incentive programs similar to the ones involved in this case wherein the court held that the plaintiff had to prove actual damages resulting from the programs).

Mr. Justice Jackson's dictum concerning the recovery of damages in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947) lends little support to the *Fowler* decision.[27] *Bruce's Juices* was a contract case. The only issue before the Court was whether a violation of §2(a) could be used as an affirmative defense to void a contract. Mr. Justice Jackson's comments, upon which Judge Johnsen and the petitioner rely, were directed toward an abstract suggestion by Bruce's Juices that it would be difficult to prove actual damages in a §2(a) case. The damage issue was not given extensive attention in the briefs filed with the Court, and the relevant legislative history on damages was not adequately brought to the Court's attention.

---

[27]Petitioner asserts that Mr. Justice Jackson's discussion concerning recovery of damages is more than mere dictum. (Pet. Br. 30). However, a reading of *Bruce's Juices* does not support this suggestion. Further, the courts and commentators have uniformly considered such language to be dictum. *See, e.g., Enterprise Industries, Inc. v. Texaco Co.*, 240 F.2d 457 (2d Cir. 1957); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — the Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 31 (1971); Note, *supra* n. 26, 21 Syracuse L. Rev. at 945 (1970); Rowe, *supra* note 11, at 1078. In fact, Judge Johnsen in *Fowler* acknowledged that the Supreme Court had not adjudicatively passed upon the automatic damage question. 415 F.2d at 1250.

Fowler has been subject to severe criticism by the commentators as espousing a damage theory which will result in windfall profits for the plaintiff, in fact, triple windfall profits. Rez, *Causation And Automatic Damages In Secondary-Line Injury Cases Under §2(a) of the Robinson-Patman Act: Is Fowler v. Gorlick Dead?* 55 Notre Dame Law. 660 (1980); Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 31-35 (1971); Note, *Private Recovery Under The Robinson-Patman Act: Confusion In the Courts On the Proper Measure of Damages,* 21 Syracuse L. Rev. 941 (1970). Likewise, economists have found the automatic damage theory to be unsound, while approving the damage rule of the *Enterprise* case. Guilfoil, *Damage Determination In Private Antitrust Suits,* 42 Notre Dame Law. 647, 677 (1967).

Moreover, it does not appear that *Fowler* now represents the law of the Ninth Circuit. *Hasbrouck v. Texaco, Inc.,* 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980). In *Hasbrouck,* Judge Callister pointed out that *Fowler* was decided prior to this Court's decisions in *Perkins v. Standard Oil Co., supra,* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* both of which are irreconcilable with the automatic damage rule announced in *Fowler.* Judge Callister noted that since *Brunswick,* the Ninth Circuit has consistently held that damages do not automatically flow from proof of an antitrust violation, and that to recover damages the plaintiff must prove antitrust injury to its business or property and the amount thereof. *Handgards, Inc. v. Ethicon, Inc.,* 601 F.2d 986 (9th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1980); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979). Additionally, in *Rutledge v. Electric Hose & Rub-*

ber Co., 511 F.2d 668 (9th Cir. 1975), the Ninth Circuit indicated that *Fowler* is no longer the law by citing *Youngston v. Tidewater Oil Co.*, 166 F.Supp. 146 (D. Ore. 1958), rather than *Fowler*, as stating the law as to what must be proven to recover damages for a violation of §2 (a) of the Robinson-Patman Act. In *Youngston*, the court stated:

> ". . . [T]o come within the reach of the provisions of the Robinson-Patman Act, one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both."

Id. at 147.

Hence, it appears that the Second, Third, Fourth, Fifth, Sixth, Eighth and Ninth Circuits have all now rejected the automatic damage theory in a §2 (a) Robinson-Patman Act secondary-line case. All these Circuits have adopted the reasoning of the *Enterprise* case. The First, Seventh,[28] Tenth[29], and District of Columbia Circuits do not appear to have considered the applicability of the automatic damage theory in a §2 (a) secondary-line case. Thus, it may be fairly stated that all Circuits which have considered the automatic damage theory in a §2 (a) secondary-line context have now rejected it and require proof of actual antitrust injury and a reasonable measurement thereof in order to recover treble damages under §4 of the Clayton Act.

---

[28]The case of *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), a secondary-line case decided prior to enactment of §2 (a), suggests that the Seventh Circuit will require proof of the fact of injury and the amount thereof to recover treble damages.

[29]Two primary-line discrimination cases suggest that the Tenth Circuit will reject the automatic damage theory in a §2 (a) secondary-line case. *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

Indeed, the compelling logic of Judge Learned Hand's *Enterprise* opinion, particularly in light of this Court's most recent explication of antitrust injury in *Brunswick,* requires the rejection of petitioner's attempt to breathe life into an otherwise moribund theory which has never gained substantial acceptance and is completely inconsistent with all antitrust damage principles.

IV. The Sherman Act Cases Do Not Support an Automatic Damage Theory in Robinson-Patman Act Cases and Are Not in Conflict With the Fifth Circuit's Opinion.

Petitioner's reliance on this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) to support the automatic damage theory and its right to recover damage in this case is misplaced. Overcharge under the Sherman Act and price discrimination under the Robinson-Patman Act are distinctly different concepts. When a party is overcharged in violation of the Sherman Act, he is paying an unlawfully fixed price which is in excess of what the competitive price would have been in the absence of the violation. In a §2 (a) Robinson-Patman price discrimination case, the price paid by the disfavored competitor is not an overcharge and is not in and of itself illegal. Unlawful price discrimination results only if (1) a competitor is charged a lower price and (2) the required injury to competition may result. The gravamen of the §2 (a) offense is not a felonious overcharge, as in price fixing, but an unlawful undercharge which has the requisite probable anticompetitive consequences.

The distinction between an overcharge and price discrimination has long been recognized by the courts which have rejected the automatic damage concept in §2 (a) Rob-

inson-Patman cases. *See, e.g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases, ¶63,343 (E.D. Wash. 1980); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 1980-81 Trade Cases ¶63,611 (3rd Cir. 1980); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350 (S.D. N.Y. 1978). *Cf. ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1933). In *Hasbrouck, Edward J. Sweeney*, and *Uniroyal*, the plaintiffs specifically made the same arguments made by the petitioner in this case. In each instance, the court rejected the applicability of *Hanover Shoe* and other Sherman Act overcharge cases to a §2(a) price discrimination case.

This Court has likewise recognized the fundamental differences between the Sherman Act and the Robinson-Patman Act. *Compare, Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (wherein this Court referred to the Sherman Act as the "charter of economic liberty"), and *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953) (wherein this Court recognized that the Robinson-Patman Act could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"). *See also, United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51 (1978). In fact, in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755-56 (1947), the case so heavily relied upon by petitioner, this Court specifically discussed the differences between offenses under the Sherman Act and those under the Robinson-Patman Act. Mr. Justice Jackson noted that, unlike a Sherman Act case, at least two transactions are necessary to constitute a §2(a) offense and concluded that "[t]hese characteristics show that the entire basis for judging under the two acts

is different and that the case law as to the Sherman Act does not fit the Robinson-Patman Act." 330 U.S. at 756.

Moreover, in *Hanover Shoe* this Court recognized the differences between an illegal overcharge and price discrimination. 392 U.S. at 494. The difference was also implicitly recognized by the Court's citation of *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) and *ICC v. United States ex rel. Campbell, supra,* in support of its holding. 392 U.S. at 490 and n. 8. Both these ICC cases recognize the distinction between an overcharge and a price discrimination.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) also indicates the inapplicability of *Hanover Shoe* and other Sherman Act cases to a price discrimination situation. In *Perkins,* this Court allowed the discrimination to be traced through three separate levels of distribution, and allowed the plaintiff to recover the damage suffered because the favored competitor was able to undersell him and thereby divert business. This presents the antithesis of the holding of this Court in *Hanover Shoe* and in *Illinois Brick Co.*

V. Petitioner Did Not Prove That It Suffered Any Antitrust Injury.

As demonstrated above, in order for a plaintiff to establish that it has suffered antitrust injury as a result of a violation of §2 (a) of the Robinson-Patman Act, it must prove that it lost sales, or had to lower its resale price, or had to make other expenditures as a proximate consequence of the price discrimination. There is absolutely no evidence in this case from which the jury could reasonably have inferred that the petitioner lost sales, was forced to lower its resale price, or was forced to make other expenditures as a proximate consequence of the sales incentive programs. The Fifth Circuit has reviewed the record, and there is no

need for this Court to duplicate its effort. Instead, this Court should only concern itself with the questions of law raised by the petitioner.

However, if this Court should undertake an independent review of the record, a few brief comments about the evidence in addition to those set forth in the Statement of the Case are in order. First, it is well established that bare uncorroborated assertions of antitrust injury do not represent substantial evidence to allow the case to go to the jury. *See, e.g., Shumate & Co. v. National Association of Security Dealers,* 509 F.2d 147 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975); *Dantzler v. Dictograph Products, Inc.,* 309 F.2d 326 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963); *Flintkote Co. v. Lysfjord,* 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Momand v. Universal Film Exchanges,* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949). No evidence was offered by the petitioner to corroborate any of Mr. Payne's conclusory assertions of injury.

The fact that petitioner's share of total Chrysler sales in the Birmingham area decreased 4% in 1972 is not corroborating evidence of lost sales. The obvious reason for this decrease was Hall Motor Company's move from Bessemer to Vestavia, Alabama in May, 1971. As demonstrated by the comparison of dealerships set forth in the Statement of the Case, the relocation resulted in more Chrysler sales being made in the Birmingham area. This is the reason for petitioner's minor decrease in market share. In fact, petitioner's sales volume actually increased in 1972 over 1971.

Petitioner's expert witness, Dr. George Ignatin, did not offer any evidence to corroborate Mr. Payne's assertions of injury. Dr. Ignatin's testimony about competitive injury dealt only with the possible affects of the programs (the incipiency standard of §2(a)). (Tr. 202-204, 222, 255-258;

J.A. 99-103, 131, 134-139). Dr. Ignatin commenced this testimony with the warning that it was based to some degree on speculation. (Tr. 202; J.A. 100). He, in effect, conceded that he did not have any evidence of actual competitive injury when he admitted that he did not know whether the other Chrysler dealers in the Birmingham area had in fact undersold petitioner. (Tr. 255-256; J.A. 135). There is absolutely no evidence in this case concerning what the other Chrysler dealers in the Birmingham area did with the bonus money they received.

Petitioner cites *Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972) and *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) as supporting its right to recover damages. (Pet. Br. 16). These cases do not help petitioner since in both of these cases the plaintiffs offered substantial evidence of antitrust injury. In *Bruce's Juices*, there was probative evidence of lost sales proximately caused by the price discrimination. *See, Bruce's Juices v. American Can Co.*, 87 F.Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951). There was no such evidence in this case. In *Bargain Car Wash*, there was substantial probative evidence of underselling by the favored competitors and lost volume by the disfavored plaintiff.[30] Petitioner did not offer any such evidence in this case.

Petitioner even goes so far as to suggest that this Court's decision in *Perkins v. Standard Oil Co.*, 395 U.S. 642

---

[30]In *Bargain Car Wash* the Seventh Circuit did not hold that the plaintiff need not show lost sales in order to recover damages as stated by petitioner. (Pet. Br. 16). The court merely held that proof of *specific* lost sales was not necessary. 466 F.2d at 1174. It appears that the purpose of the court in making this statement was to indicate that circumstantial evidence could be used to establish the necessary antitrust injury.

(1969) supports its right to recover damages. (Pet. Br. 23). This suggestion is mystifying since in *Perkins* this Court specifically stated:

> "Before an injured party can recover damages under the Act [§2(a) of Robinson-Patman]; he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injured suffered."

Id. at 648. The plaintiff in *Perkins* established a causal connection by proving that it was in fact being undersold by its favored competitors which caused it to lose business. *Id.* at 645, 648, 649. No such proof was offered in this case.

Since petitioner did not prove that it suffered any antitrust injury as a proximate consequence of the incentive programs, there is no evidence in the record to support a finding by the jury that the incentive programs were a material cause of petitioner going out of business. In fact, the statistical evidence demonstrates that the primary reason petitioner's business failed was its poor used car operation. (Tr. 538-539, J.A. 195-196). Petitioner consistently realized the lowest average gross profit on its used car sales. (Def. Ex. 31, Tr. 539; J.A. 269).

In its brief, petitioner opined that its low used car profit was the result of overallowing on trade-ins. (Pet. Br. 22). There is no evidence in the record to support this speculation by petitioner. Moreover, Mr. Payne indicated that the reason for the low used car profits was the fact that Chrysler Credit Corporation had reduced petitioner's line of credit on used cars which forced him to wholesale these cars at a lower profit margin. In fact, Mr. Payne acknowledged that this action by Chrysler Credit is what *primarily* destroyed his business. (Tr. 98-100; Def. Ex. 1, p. 77-83, Tr. 122; J.A. 61-64, 260-264).

This testimony by Mr. Payne totally invalidates the unsupported assertion of petitioner on page 22 of its brief that Chrysler Credit reduced the used car line of credit because of the low profits being realized on used car sales. According to Mr. Payne, the credit restriction caused the low profits not vice versa.

Additionally, the statistical evidence demonstrates that the sales incentive programs did not affect petitioner's used car operation or its overall performance. This is evident from the fact that in 1972, petitioner averaged its lowest bonus per unit sold of any of the years involved in this case. It averaged $34 per car as compased to $80 per car for Central, $62 per car for Roebuck, and $72 per car for Vestavia (Hall Motor Company). (Def. Ex. 36, Tr. 613; J.A. 270). However, in 1972, petitioner realized its highest gross profit on used car sales of any of the years involved in this suit, and lost less money than in 1971 or 1973. (Def. Ex. 31, Tr. 539; J.A. 269). In 1971 and 1973, petitioner averaged the largest bonus per unit sold of any of the Birmingham Chrysler dealers, yet its gross profit on used car sales was lower than in 1972, and it lost much more money in 1971 and 1973 than in 1972. (Def. Ex. 31, 36, Tr. 539, 613; J.A. 269, 270).

The failure of petitioner to prove antitrust injury resulting from the incentive programs precludes the recovery of any damages under §4 of the Clayton Act.

VI. Petitioner Used Improper Methods of Calculating Damages Which Did Not Reflect Antitrust Injury.

Even if the petitioner had presented evidence of antitrust injury resulting from the sales incentive programs, it still is not entitled to recover damages, since it failed to introduce any probative evidence of the amount of injury. All petitioner's damage calculations are premised on the presump-

tion that it is entitled to recover the amount of the alleged price discrimination as lost profits.

(a) The Amount Of The Alleged Discrimination Does Not Reflect Antitrust Injury In This Case.

What petitioner contends represents the amount of the price discrimination does not reflect the antitrust injury which the sales incentive programs could have inflicted. This is evident from the manner in which petitioner computed what it contends to be the amount of the discrimination. Petitioner determined this amount by calculating what it called the "rebate per unit sold" received by all Chrysler dealers in the Birmingham area under each incentive program. When petitioner did not receive the highest rebate per unit, it took the difference between what it received per unit and the highes rebate per unit received by any of the other Chrysler dealers, and multiplied this difference by the number of such cars sold by petitioner during the program period. (Tr. 228-229; J.A. 132-134). This calculation resulted in a total alleged discrimination of $81,248.94.[31] (Tr. 191; J.A. 99).

Petitioner made no attempt to establish that this figure reasonably reflected profits lost from lost sales, from forcing business, from overallowing on trade-ins, or from having to take any other steps to remain competitive with the so-called favored dealer. In short, this figure does not reflect how much worse off petitioner was because other dealers received more bonus money.

[31]This calculation does not accurately reflect the amount of any price discrimination. In this case, petitioner contended that the retail sales incentive programs were discriminatory because its qualification objectives were too high. (Tr. 57-58, 84, 102; J.A. 43, 67-68). Hence, the amount of the discrimination, if indeed there was any, would be the difference between what petitioner actually received from participation in the retail incentive programs and what it would have received if its objectives had been "non-discriminatory." Petitioner did not present any evidence of what this amount would have been.

Moreover, this method of calculating damages is fundamentally unsound since it assumes that the more cars petitioner sold during a program, the more it was injured. Such an assumption is unrealistic. The more cars petitioner sold, the less it could have been injured by the incentive programs. This is quite obvious from the fact that petitioner averaged the highest gross profit on new retail sales of any of the Chrysler dealers in the Birmingham area. (Def. Ex. 31, Tr. 539; J.A. 268). Unquestionably, petitioner's injury would not have increased as its sales increased. (Tr. 565-567).

Petitioner's method of calculating the alleged amount of the discrimination is very similar to the plaintiff's damage calculations in *Rea v. Ford Motor Co.*, 497 F.2d 577, 588-90 (3rd Cir.), *cert. denied*, 419 U.S. 868 (1974). The Third Circuit resoundingly rejected such damage calculation because it did not reflect the injury which the antitrust violation could have inflicted.

Another basic flaw in petitioner's damage calculation is that it did not make any deduction from the alleged amount of the discrimniation to reflect the occasions when petitioner received the highest rebate per unit or when it received more under the 5% rebate program than it would have under the alternative incentive program.[32] (Tr. 565). By failing to make such adjustments, petitioner's calculations resulted in inflated damages.

---

[32]The 1971 Big Dollar Payoff is a good example of how petitioner inflated its damage calculation by not making a credit adjustment when it received the highest per unit rebate. According to petitioner's calculations, under this program, it received $28.43 per unit for sales of Valiants while Roebuck Chrysler-Plymouth received $54.03 per unit. Since petitioner sold 51 Valiants during the program, petitioner contends that it suffered a discrimination of $1,305.65. However, on sales of all other car lines, which constituted most of the sales under the program, petitioner received the highest per unit rebate. Petitioner received $107.98 per unit compared to $35.59 per unit for the next high dealer, Roebuck. Obviously, petitioner was not injured by this program; nevertheless, it included the $1,305.65 of alleged discrimination in its total discrimination figure and did not deduct anything for the payments it received above the other dealers. (Pt. Ex. 39, Tr. 222-223; J.A. 230).

Petitioner never attempted to correlate the alleged amount of discrimination to profits which it allegedly lost as a result of favored competitors making competitive use of their bonus money. Hence, the alleged amount of the discrimination is not reflective of antitrust injury and cannot support the jury's verdict. To allow petitioner to recover the alleged amount of discrimination would be tantamount to awarding petitioner triple windfall profits, a result never intended by Congress nor sanctioned by this Court.

(b) Petitioner's Going Concern Calculations Were Based On Speculation And Unsupported Assumptions And Do Not Reflect Antitrust Injury

Petitioner's going concern or good will calculations also do not support the jury's verdict. First, there was no proof that the incentive programs were a material cause of petitioner going out of business.[33] Moreover, these calculations were based on nothing other than speculation and unsupported assumptions. The courts have made it clear that going concern calculations or projections of future profits may not be based on speculation, guesswork or conjecture but must be based upon reasonable assumptions supported by the record. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 80-83 (1st Cir. 1970); *Joseph E. Seagram & Sons v.*

[33]Dr. Ignatin, petitioner's expert, did make a vague statement that if petitioner had received $81,000 more profit (the alleged amount of the price discrimination) over the period involved in this suit, he thought that it might have continued in business. (Tr. 213; J.A. 118). Since the alleged amount of the discrimination does not reflect antitrust injury to petitioner, this vague suggestion is not sufficient to establish that petitioner's business failed as a proximate consequence of the incentive programs. Further, the evidence indicates that even if petitioner had received an extra $81,000 in profits over the period involved in this case, it still would have gone out of business, since it still would have lost over $30,000 during this period (Tr. 268; J.A. 149), and, according to Dr. Ignatin's projections, would have lost an additional $20,000 in 1974 (Tr. 210; J.A. 113-114) and $10,000 in 1975 (Tr. 211; J.A. 114-115).

Hawaiian Oke Liquors, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958). Instead, going concern calculations or projections of future profits must be based on such relevant factors as the local and national economy, on the condition of the relevant market, on likely future sales, and on the costs of making such sales. *Id.* In calculating the going concern value for petitioner and in projecting future profits, Dr. Ignatin failed to follow the guidance of these cases. As Judge Johnson correctly noted, his predictions were based on sheer speculation. 607 F.2d at 1137, (J.A. 8-10).

Dr. Ignatin used two equally faulty methods of calculating plaintiff's going concern value. Under his first method, he simply took what Mr. Payne told him was the good will value of the petitioner after it merged with LeSeur Motors in 1955 and multiplied this figure by a growth rate of 4% per year.[34] This resulted in a projected going concern value for the petitioner of $100,000 in May, 1974. (Tr. 207-209; J.A. 108-111). Dr. Ignatin did not take into account any economic factors, local market conditions, or how the petitioner actually performed over this time period. (Tr. 209, 265; J.A. 112, 145). Further, his calculation was never related to the incentive programs or their effect on petitioner.

Under his second method of calculating petitioner's going concern value, Dr. Ignatin projected future profits which he opined the petitioner would have made through 1977 (the year this case went to trial). He then discounted these projected profits back to a 1974 value of $32,000 by using a 6%

[34]The speculative nature of this method of calculating going concern value is accentuated by Dr. Ignatin's admission that Mr. Payne was not clear about what the good will value was. (Tr. 207; J.A. 107-108). Dr. Ignatin did not make any independent study to try and confirm Mr. Payne's equivocal estimate. (Tr. 261-262; J.A. 140-142).

discount rate. (Tr. 210-217; J.A. 112-124). Next, he was allowed, over objection, to calculate a going concern value of petitioner in 1977, based on his assumption that it was reasonable to assume that after 1977 petitioner would earn $20,000 profit per year. He capitalized this at a 10% rate which resulted in a going concern value of $200,000 in 1977. This figure was discounted to a 1974 value of $170,000 by using a 6% discount rate. (Tr. 217-218; J.A. 124-126). Dr. Ignatin combined the discounted future profit projection and the 1977 going concern value to derive his second going concern value of $202,000. (Tr. 219-220, J.A. 127-128; Pt. Ex. 63, Tr. 223).

This second method is faulty because the going concern value was computed at an improper date and because it allowed petitioner to recover both going concern value and future profits. *Pollock & Riley v. Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971). Further, in making his projections, Dr. Ignatin did not take into account the local economy, how the local automobile market fared, how the local Chrysler dealers performed, what future sales could have been reasonably expected, or what future costs and expenses would reasonably have been incurred. (Tr. 269-270, J.A. 151-152, 155). Moreover, Dr. Ignatin's basic assumption that the local dealers would fare as Chrysler did is unsupported by the record. The record shows that Birmingham was a poor market for Chrysler (Tr. 270; J.A. 152), and that the profits realized by the local dealers did not track the profits being realized by Chrysler. (Tr. 606-610; J.A. 216-220).

Dr. Ignatin's second method of calculating going concern value is just as speculative as his first method. Neither will support the jury verdict, and it was error for the trial judge to allow the jury to consider such testimony. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957, 999-1000 (5th Cir. 1976); *Joseph E. Seagram & Sons v. Hawaiian Oke Liquors, supra; Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra.*

VII. The Public Interest Will Be Served By Affirming The Fifth Circuit.

When the rhetoric in petitioner's brief is cast aside, it is clear that petitioner is urging this Court to reverse the Fifth Circuit for rejecting the automatic damage theory and requiring the petitioner to prove that it suffered actual antitrust injury and the amount thereof. Petitioner urges the Court to adopt such a damage rule as matter of public policy. However, determining public policy is the perogative of the Congress and not the courts. Where Congress has unmistakenly declared the policy, as here, by unequivocably rejecting the automatic damage principle, this Court should not undertake its own policy consideration. Nevertheless, the public interest would best be served by rejecting petitioner's automatic damage concept and affirming the Fifth Circuit.

The application of an automatic treble damage rule would more likely than not redress any imbalance in the competitive positions of the favored and disfavored purchaser to such an extent that the originally favored purchaser would be far worse off than the originally disfavored purchaser. Such a policy would be especially pernicious, in cases such as this, if differences in price resulting from incentive programs initiated in good faith to reward competitive effort are to be regarded as illegal. The indolent, incompetent, inefficient businessman who does not strive to be competitive will be rewarded by treble damages for the asking. He will be encouraged to sit back and not sell or compete aggressively in the certain expectation that when the contest is over he may very well receive more from his supplier than he would if he had tried to compete, regardless of whether he has lost any business or not. Surely in this age of declining productivity the country does not need this particular public policy.

The adoption of an automatic damage rule by the Court will undoubtedly have an adverse, if not devastating, effect in the market place. In view of the arguably lenient standard of what is required to infer the requisite injury to com-

petition under § 2(a), the adoption of an automatic damage rule would inevitably spawn an incalculable number of meritless and frivolous § 2(a) cases. Plaintiffs will be seeking what are undeubtedly windfalls since the amount of the discrimination may often be sifnificently more than any actual loss suffered by the plaintiff. Indeed, according to petitioner's theory, there need not be any actual injury at all before a plaintiff would be entitled to recover three times the amount of a price discrimination. The threat of massive treble damage exposure every time a seller lowers his price, irrespective of any actual injury resulting therefrom, can only foster price rigidity, impede natural market forces, thwart competition, and result in economic stagnation.[35]

The adoption of the automatic damage theory would, in addition to authorizing windfall recoveries, endanger the existence of many businesses. That danger is well illustrated by the case at bar. Under plaintiff's theory of what constitutes an illegal price discrimination, there has been an illegal discrimination every time the same per unit bonus is not realized by the individual dealers under an incentive program. Because of the individualized objectives involved in these programs, assuring all dealers an equal opportunity to participate in the programs and to receive equal bonuses for comparable performance over their objectives, it is extremely unlikely that any two dealers in a market area will receive the same exact per unit bonus on every car sold during a program. The adoption of the automatic damage theory would mean that most Chrysler dealers in the United States would have an enforceable treble damage claim against Chrysler arising from one or more of the incentive programs. Certainly, Chrysler cannot survive such an onslaught of lawsuits. Neither could other manufacturers which might

---

[35] *See,* Handler, *The Shift From Substantive To Procedural Innovations In Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 Colum. L. Rev. 1, 35 (1971); Note *supra.*, 21 Syracuse L. Rev. 941, 953 (1970); Rez, *Causation And Automatic Damages In Secondary-Line Injury Cases Under § 2(a) Of The Robinson-Patman Act: Is Fowler v. Gorlick Dead?* 55 Notre Dame Law. 660, 679 (1980).

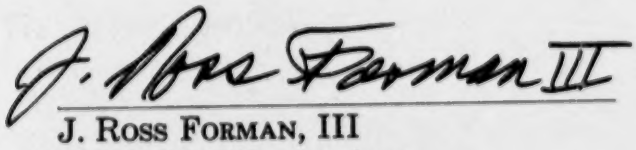
offer similar incentive programs in connection with the sale of their products.

Any policy analysis requires that the Fifth Circuit's opinion be affirmed. Not only will this avoid disastrous results, but the cause of economic justice including the compensation of those who suffer actual antitrust damage from illegal price discrimination, will be served in the framework of our traditional principles of jurisprudence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Fifth Circuit's opinion is consistent with congressional intent, traditional antitrust principles, and the public interest, and, therefore, should be affirmed.

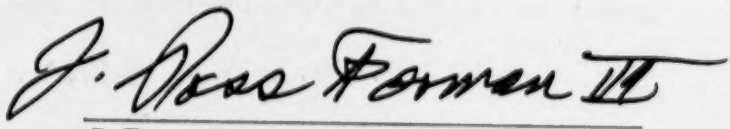
Respectfully Submitted,



J. ROSS FORMAN, III
Counsel for Respondent,
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I, J. Ross Forman, III, a member of the Bar of this Court, hereby certifies that three copies of Respondent's Brief on the Merits have been separately served upon C. Lee Reeves, attorney of record for petitioner, at 2222 Arlington Avenue, South, Birmingham, Alabama 35205, upon John T. Cusack, attorney of record for *amicus curiae* Vanco Beverage, Inc., at One First National Plaza, Suite 3300, Chicago, Illinois 60603, and upon Robert H. Whaley, attorney of record for *amicus curiae* Hasbrouck, at Fifth Floor, Spokane & Eastern Building, Spokane, Washington 99201, by depositing the same in the United States mail, first class postage prepaid, and properly addressed on December 30, 1980.



J. ROSS FORMAN, III

JAN 1981

CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

C. LEE REEVES
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111
Counsel for Petitioner

Of Counsel:
SIROTE, PERMUTT, FRIEND, FRIEDMAN,
HELD & APOLINSKY, P.A.
2222 Arlington Avenue, South
Birmingham, Alabama 35205
(205) 933-7111

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

I. Chrysler's Rebate Programs Caused Price Discrimination Against Payne 1

II. A Jury is Entitled to Infer Injury from Price Discrimination Coupled with Other Corroborating Evidence 3

A. The Fifth Circuit Wrongfully Precludes Inferential Proof of Damage and Requires Proof of Specific Lost Sales and Profits 3

B. Inference of Injury Is Proper Since There Was Keen Competition In the Market, Relatively Small Profit Margins, Sustained, Substantial Price Discriminations Which Influenced Retail Prices, Lost Sales, and A Decline in Payne's Profits 5

III. The Minimum Damage Rule is Not Precluded by the Legislative History of the Robinson-Patman Act 9

IV. Courts have Inherent Authority to Determine the Best Method to be Used in Proving Damage 12

V. Case Law Prior to Passage of Robinson-Patman Act Permitted the Minimum Damage Rule 13

VI. The Minimum Damage Rule Better Effectuates the Purpose of the Act and is Supported by the Sherman Act Cases 14

VII. Prior to this Decision by the Fifth Circuit, Most Appellate Courts did not Preclude Use of the Minimum Damage Rule 16

VIII. Price Discrimination Injures the Economic Opportunities of the Disfavored Purchaser 19

IX. *Brunswick* Does Not Require This Court to Eliminate the Minimum Damage Rule 20

X. Payne's Going Concern Value was Reasonable and Supported by the Evidence 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases — *Page*

American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir. 1951), *modified on other grounds and rehearing denied*, 190 F.2d 73, *cert. dismissed*, 342 U.S. 875 (1952) 18

American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1930) 13

American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951) 17, 18

Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163 (7th Cir. 1972) 3, 7

Baxter Imports, Inc. v. Saab-Scania of America, Inc., 1980-2 Trade Cases ¶ 63367 (D. Minn. 1980) 18

Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc., 203 F.Supp. 92 (E.D. Mich. 1962) 11

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 8, 14, 21

Bruce's Juices v. American Can Co., 330 U.S. 743 (1947) 4, 11, 16, 18

Bruce's Juices v. American Can Co., 87 F.Supp. 985, *aff'd*, 87 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 63 (5th Cir.), *cert. dismissed*, 342 U.S. 875 14

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 20

Century Hardward Corp. v. Acme United Corp., 467 F.Supp. 350 (E.D. Wis. 1979) 6

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 14, 21

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 14

E. Edelmann and Co. v. F.T.C., 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958) 8, 15

TABLE OF AUTHORITIES – (Continued)

Page

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) 17, 18

Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) 4, 16, 18

Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) 18

F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948) 7, 8, 16

Grace v. E. J. Kozin Co., 538 F.2d 170 (7th Cir. 1976) 18

Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975) 21

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 12

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 15, 16

Hasbrouck v. Texaco, Inc., 1980-2 Trade Cases ¶ 63343 (E.D. Ore. 1980) 18

Hobart Brothers Company v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973) 21

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 15

Interstate Commerce Commission v. United States, 289 U.S. 385 (1933) 4, 17

McCaskill v. Texaco, 351 F.Supp. 1332 (E.D. Ala. 1972), *aff'd sub nom., Harrelson v. Texaco*, 486 F.2d 1400 (5th Cir. 1973) 18

NBO Industries Treadway Companies v. Brunswick Corp., 523 F.2d 262 (3rd Cir. 1976), *reversed, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 20

National Dairy Products Corp. v. F.T.C., 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968) 8

Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969) 3, 8, 16

Rutledge v. Elec. Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975) 18

TABLE OF AUTHORITIES – (Continued)

Page

State Wholesale Groceries v. Great Atlantic & Pacific Tea Co., 202 F.Supp. 768 (N.D. Ill. 1961) 19

Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16 (5th Cir. 1969) 21

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 8, 14, 21

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979) 18

Statutes and Other Authorities

Areeda and Turner, *Antitrust Law*, vol. 2 (1978) 19

Damages Under the Robinson-Patman Act, 31 Md. L. Rev. 60 (1971) 17

Patman, *The Robinson-Patman Act* (1938) 10

Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365 (1970) 14

H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936) 9, 10

H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 12, 15

Hearings on H.R. 8442, et al, Before the Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess. (1935) 10

Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 15

80 Cong. Rec. 6348-49 (1936) 10

S. 3154, 74th Cong., 2d Sess. (1936) 9

Fifth Circuit Local Rule 21 18

CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Petitioner is satisfied with its Statement of the Case contained in its Brief on the Merits, 2-8.

ARGUMENT

I. Chrysler's Rebate Programs Caused Price Discrimination Against Payne.

The jury found the retail[1] price rebates discriminated against Payne in price on certain model cars, were unfair and not equally available because of the higher purchase and sales

[1]Fleet rebate programs were not an issue at the trial, nor are they relevant here.

quotas Chrysler assigned Payne before it could receive a rebate. Because the Fifth Circuit did not reject the jury's holding on this issue, the rules of the rebate programs and their inequities have not been covered in detail by Petitioner in its Brief.[2]

Chrysler seeks to mask the effect of the per car price discrimination in each program's duration by averaging *all* rebates over a three and one-half year period (Res. Br. 12). The discrimination resulting from the rebates, however, cannot be properly examined by looking at the *total* amount of rebates paid over the three and one-half year period because that overlooks the price discrimination against Payne on each individual car during each individual program's two or three month's duration.[3] If the rebates had truly been equally available to

---

[2]Pl. Ex. 1-16 are the rebate programs causing the price discrimination. Each dealer would be paid a rebate only if that dealer satisfied its quota of selling cars at retail (or its quota of purchasing at wholesale from Chrysler). For example, in "Winter Winners" (Pl. Ex. 1; Tr. 140-144). Payne was assigned a purchase objective quota of 99 new cars, with the next highest quota being assigned to Central for 63 cars. In that program's duration of three months, Chrysler rebated up to $135.00 per car depending upon the various levels of qualification by the various dealers after meeting their quotas. Had Payne been able to receive rebates the same as the other dealers, it would have received approximately $8,235.00 on the new cars it purchased from Chrysler. In that program, Payne received no rebates whatsoever, Central received $5,310, Roebuck received $8,310, and Vestavia (Hall) received $3,015 (Pl. Ex. 1; Tr. 140-144). Payments are shown on Pl. Ex. 37, 38; App. 228-229.

[3]Chrysler divided the total number of cars sold by each dealer by the total amount of rebates received and then determined an average rebate difference (Res. Br. 12) over three and one-half years. This ignores the price disadvantage to Payne on each particular model or "car line" during each program when the dealers were competing for the resale of those cars. Approximately every 90 days the dealers sold all their new cars (Tr. 60-61; 83) and hence got the rebates. Price discrimination under the Robinson-Patman Act is determined by comparing Chrysler's prices for the same model car (like grade and quality) to all dealers during a contemporaneous time period, as opposed to an average price over years.

Of Payne's approximately $99,000 in total rebates over the 3½ year period (Def. Ex. 28; App. 267), 72% was received on cars where the programs were not discriminatory and on which Payne claimed no damages (Tr. 687-688).

Payne, as they were to the favored dealers, then the volume of the dealership would be irrelevant. Both large volume dealers and low volume dealers would each receive approximately the same rebate on each car sold.

II. A Jury Is Entitled To Infer Injury From Price Discrimination Coupled With Other Corroborating Evidence.

A. *The Fifth Circuit Wrongfully Precludes Inferential Proof of Damage and Requires Proof Of Specific Lost Sales and Profits.*

The Fifth Circuit's opinion rejects proof of antitrust injury through inferential or circumstantial evidence and holds that a plaintiff can only recover damages if he can directly prove a loss of sales or profits.[4] It misconstrues Payne's position by saying that Payne contends that mere price discrimination is insufficient to prove injury. (607 F.2d at 1136; App. 6). Its opinion ignores the well established rule in *Perkins v. Standard Oil Co. of California,* 395 U.S. 642, 628 (1969), that inference of antitrust injury is permitted, and that the ultimate conclusion of what the evidence proved should be left to the jury.

---

[4]Despite Chrysler's position to the contrary, the Fifth Circuit's opinion plainly held that antitrust injury could only be proved by directly proving lost sales and lost profits, and not from other inferential proof or circumstantial evidence:

> Competition is harmed *only* to the extent that the favored purchaser, by the use of the discriminatory price difference, actually *draws sales or profits* from his unfavored competitor . . . .
>
> * * *
>
> A price difference without more does not indicate the amount of lost sales or profits.

607 F.2d at 1136-37 (emphasis added).

Chrysler attempts to disassociate itself from the ruling of the Fifth Circuit and tacitly admits (Res. Br. 2) that the Fifth Circuit's opinion is too burdensome. Cessa Aircraft Company (Amicus Brief, pg. 4) states that the Fifth Circuit "squarely rejected" the proposition that antitrust injury may be inferred. Yet Chrysler, in its brief at page 2 and page 40, n. 30, admits that antitrust injury may be inferred from circumstantial evidence, citing *Bargain Carwash, Inc. vs. Standard Oil Co.,* 466 F.2d 1163 (7th Cir. 1972).

Contrary to Chrysler's statements (*See*, e.g., Res. Br. 13), Payne does not contend that, in a total vacuum absent other corroborative proof, mere price discrimination automatically indicates damage to the disadvantaged purchaser.[5] By seeking the elimination of the "general damage," or "minimum damage" rule,[6] Chrysler is necessarily asking this Court to overrule *Perkins* which permits a jury to infer actual antitrust injury from the evidence in the case.

Payne is not requesting this Court to announce a *per se* damage rule in Robinson-Patman Act cases. Chrysler tries to obscure the fact that the Fifth Circuit erroneously required Payne to assume the unwarranted burden of proving specific lost sales and profits, rather than permitting inferential proof of injury, which normally occurs in the market place where its supplier's costs are higher than its competitors. In *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947), this Court implicitly recognized that a defendant would have an opportunity for rebutting the normal occurrence of injury in the amount of price discrimination if "extraordinary circumstances" do arise. The Fifth Circuit's decision ignores this fact, and hence requires a far too heavy burden on the plaintiff.

Relying principally on *Enterprise Industries, Inc. v. Texas Companies,* 240 F.2d 457 (2d Cir.), *cert denied* 353 U.S. 965 (1957), and other decisions following that case, the Fifth Circuit has misinterpreted the principles governing proof of damage. *Enterprise,* relying on *Interstate Commerce Commission v. United States,* 289 U.S. 385, 391 (1933), does permit inferential proof of damages *without* proof of specific loss of sales or profit. *Enterprise* left room for an inference of damage when the price discrimination is supplemented by other cor-

---

[5]*See,* argument at Pet. Br. 9, 13, 24, and 25, where other evidence supporting the price discrimination is required.

[6]The rule sought by Payne is more appropriately known as the "minimum damage rule" because the price differential, in the absence of proof of lost sales and profits or other consequential damage, is the "minimum damage" to which an injured party is entitled.

roborating evidence.[7] As shown in the following sections, there was a vast amount of corroborating evidence showing damage to Payne.

B. *Inference of Injury Is Proper Since There Was Keen Competition In The Market, Relatively Small Profit Margins, Sustained, Substantial Price Discriminations Which Influenced Retail Prices, Lost Sales, and A Decline In Payne's Profits.*

Keen Competition

Unrefuted testimony showed that the price discrimination, in a market of keen competition, caused Payne to lose sales and was a cause of Payne's being forced out of business.[8] Even if by itself this evidence does not show antitrust injury, it is nevertheless good and useful evidence which, at the very least, permits an inference of damage.

Chrysler's review of the dealers' average gross profits (Res. Br. 10-11) does not refute testimony that Payne lost sales to other dealers, forced business, over-allowed on trade-ins, and that competition was keen. First, the figures contain no breakdown of the gross margin per car for those cars on which Chrysler paid a rebate at the time of the price discrimination. Thus, there is no examination of competition on those cars at that particular time. Secondly, the figures do not contain a major element of the profits of each dealer on the sale of a new car — profits on resale of the used car trade-ins. After the used cars

---

[7]240 F.2d at 459-460, where the Second Circuit recognized that damage is "a necessary inference" of discrimination when there is "more" evidence than mere price discrimination.

[8]Payne's new car customers compared Payne's prices with the other three competing dealers (TR. 45-46; App. 18-19). Payne's customers regularly informed Payne during the rebate programs that they were not buying at Payne because they could buy the same cars at lower prices at the other three competing Chrysler dealers (TR. 126-127; App. 95). The price discrimination was one of the causes of Payne's ceasing business, (TR. 69, 100, 705-706; App. 39, 65, 222-223). Chrysler attempts to discount this evidence by saying it is uncorroborated (Res. Br. 7). This evidence supports an inference of damage.

gross profit figures are added to this analysis, it is clear that Payne always received the least gross profits.[9]

Lost Sales

Payne also showed that it lost a substantial amount of business in the retail sales market from the rebate discrimination. (Tr. 55, 76-70, 91-95, 97-100, 126-127; App. 29-30; 34-40; 50-57; 60-64; 92-95). In 1972, its share of the retail market decreased from 27% to 23%. In 1973, after Chrysler discontinued those rebate programs which based the rebates on the dealer's alleged "fair share" of the market, Payne's share of the market increased only 2%.[10] The rebate programs continued to discriminate against Payne, even after its "fair share" programs were eliminated, because the quotas assigned by Chrysler to Payne were too high since Vestavia was now in the same trading zone as Payne and Payne could not sell enough cars to meet its quota and receive a rebate.

---

[9]Payne's used car department, according to the unrefuted testimony, was the area where Payne's business suffered most because of over-allowing to obtain new car sales. When the dealer profit comparisons for those years are examined using the average gross profits of *both* the used and new cars (from Def. Ex. 31; App. 268-269), the results show that Payne was lowest in profit margin because of the price discrimination:

Average Gross Profit (New and Used Cars)

	J. Truett Payne Co.	Hall Motor	Roebuck	Central
1971	494	676	567	499
1972	548	590	588	537
1973	543	592	625	645

Since Payne had the lowest profit margin because of price discrimination, it is clear that it could not pass on its higher costs for the cars to its customers. In such a case, the amount of the price discrimination is the amount of the damage. *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979).

[10]Def. Ex. 31; App. 268. Payne's "fair share" of the market was unilaterally determined by Chrysler to be 40.19% until 1973, when it was revised to 25.99%. Many rebate programs used until 1973 based the quotas assigned to Payne on that "fair share". The other dealers' "fair share" in 1972 were as follows: Central – 25.77%; Roebuck – 21.05%; Vestavia – 12.99%, (Pl. Ex. 36; Tr. 59). During this period from 1970 through 1973, Chrysler was enjoying a period of prosperity, contrary to the problems it is having today.

Tight Profit Margin and Substantial Price Discrimination

The amount of the rebated price discriminations was substantial, totalling $81,248, and ranging up to several hundred dollars per car in some of the various programs (e.g. Pl. Ex. 48, 52, 53; App. 239, 243, 244). The net profits of the dealer on the sale of new cars was usually less than the amount of the rebate,[11] certainly indicating the fact of tight profit margin. With rebates being in many instances 50% or more of the average gross profit (*See* Def. Ex. 31; App. 268) and as much or more than the *net* profits, the jury could properly infer that the substantial amount of the price discrimination affected the retail sales price.

F.T.C. v. Morton Salt Co., 334 U.S. 37, 50-51 (1948), established the rule that price discrimination, substantial enough to affect retail prices, is sufficient to support inference of injury. Unrefuted testimony shows that the rebates did in fact influence the retail sales price between the competing dealers in the Birmingham area.[12] Therefore, under *Morton Salt* there is sufficient evidence to support the inference of damage to Payne.

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), the Seventh Circuit held that a jury could properly infer injury under Section 4 of the Clayton Act in the following situations:

---

[11]In 1971 the net profits per new car varied from $−32.59 to $130.80 per new car; in 1972, from $26.50 to $197.76 per new car; in 1973, from $35.00 per car to $72.53 per car. Following Chrysler's logic on page 10-11 of its brief, these figures certainly show keen competition in the market.

[12]*See*, Mr. Payne's testimony (Tr. 62, 67, 124-125; App. 32-33, 36-37, 92-93). Dr. Ignatin also testified that the retail prices were affected by the discrimination so significantly that they were higher for the consumer than they otherwise would have been absent that discrimination (Tr. 203-204; 255-256; App. 134-135; 101-103). At one point Mr. Payne stated that he did not think the rebates affected the retail sales price of the automobiles (Tr. 85). However, both prior to and after that testimony, Mr. Payne stated that because the other dealers were receiving the cars at a lower price from Chrysler, and because he knew his customers were buying the same cars from the competing dealers at a lower price than Payne could sell them, the price rebates discrimination did reduce the retail sales price.

[1] . . . a price differential that influences prices . . . (*Morton Salt Company*) . . .

[2] . . . a price differential that exists in the context of keen competition and tight profit margins (*E. Edelmann Company*[13] . . .) . . .

[3] or a substantial and sustained price differential between competing resellers (*National Dairy Products Corp.*[14]).

The instant case has evidence supporting all three alternatives above in addition to the direct testimony that price discrimination caused a loss of Payne's sales and caused Payne to go out of business (Tr. 69, 100, 706; App. 39, 65, 222-223).

Decline in Profits

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969), this Court held that proof of "decline in . . . profits" during the period of price discrimination would be sufficient evidence by which a jury could infer injury under Section 4 of the Clayton Act. During the years 1970 through 1973, the period at issue in this case, Payne suffered losses in each year.[15]

Under this Court's decision in *Perkins v. Standard Oil of California*, 395 U.S. 642, 648 (1969), Payne introduced sufficient supporting evidence to permit the jury's finding (inference) of damage. Substantial evidence in the instant case showed (1) substantial price discrimination, (2) in a keenly competitive market, (3) with tight profit margins, (4) which affected retail sales prices, (5) was a cause of Payne's business failing, and (6) caused the profits of Payne to decline during the time of the price discrimination. Thus, the amount of the price discrimination in this case is the best approximate amount of damage. That amount of damage need not be exact.[16]

---

[13]*E. Edelmann Co. v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956).

[14]*Nat'l Dairy Prod. Corp. v. F.T.C.*, 395 F.2d 517 (7th Cir. 1968), *cert. den.*, 393 U.S. 977.

[15]*See*, Pl. Ex. 32-35; 61; Tr. 71; 288-289. Payne had a profit in 1967 and 1968, and a slight loss in 1969.

[16]*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1968); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). In *Zenith Radio*,

III. The Minimum Damage Rule Is Not Precluded By The Legislative History Of The Robinson-Patman Act.

In the original Senate provision of the Robinson-Patman Act, there was proposed a damage clause which would provide that the measure of damages, in the absence of proof of greater damage, would be presumed to be the amount of the prohibited discrimination.[17] Because this presumption of damages was omitted from the final Act as passed by both Houses of Congress, Chrysler contends that this omission declared Congress' intent that the minimum damage rule should never be permitted in awarding damages.

Chrysler's argument is specious because it utilizes a "negative" inference from legislative history which is far from clear. Chrysler claims Mr. H. B. Teegarden so desired that damage provision in the Act that his views on its interpretation and use should be attributed to Congress. Mr. Teegarden was general counsel for a special interest group, the Wholesale Grocer's Association, and explained to Congress what he thought of the proposed bill and its damage provisions. Merely because Mr. Teegarden thought the presumptive damage provision necessary does not mean that Congress (either the House, the Senate, or the House and Senate conferees) believed that under § 4 of the Clayton Act the amount of the price discrimination could not be awarded without a new provision on damages being placed in the Act.

The proposed damage section was eliminated by the conference committee which utilized the House Judiciary Committee's version of the Bill, a very different version from the Sen-

---

this Court held that the measure of proof needed to fix the amount of damages was much less than that required to show that there was, in fact, some damage sustained by the plaintiff.

[17]Subsection 2 (d) of the Senate's version of the proposed Act contained this presumption of damage clause. S. 3154, 74th Cong. 2d Sess. (1936). The Bill reported by the House Judiciary Committee did *not* contain a damage clause (H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 1-20 (1936)), and there is no reason given, if indeed there was one, for its omission.

ate version. There was absolutely no reason given why the Senate conferees agreed to "recede" and eliminate that proposed subdivision on damages.[18] During Mr. Teegarden's and Senator Robinson's brief statements on the proposed damage section, none of the House or Senate members ever gave their own views or agreed or disagreed on that provision.[19] Nor did the Conference Report comment on whether the amount of the price discrimination could or could not be the minimum amount of damage under § 4 of the Clayton Act.[20]

Congressman Wright Patman, who was the sponsor of the Act and the most intimately familiar with it, has attributed the deletion of the Senate's damage provision to merely legislative bargaining.[21] The omission of the proposed language on damages in the final version of the Act cannot rationally be taken to mean that Congress has rejected the minimum damage rule concept. There are many reasons why it could have been eliminated other than the fact that Congress did not desire a court to utilize its inherent powers to determine the best legal method of proving injury.[22] This Court has recognized that

---

[18]H. R. Conf. Rep. No. 2951, 74th Cong. 2d Sess. 8 (1936).

[19]*See, Hearing on H.R. 8442, et al., before the Comm. of the Judiciary, House of Representatives,* 74th Cong., 1st Sess., Ser. 10, pt 1, 219-221 (1935). The statements of Senator Robinson cited by Chrysler (Res. Br. 23-24, n. 21) are taken out of context. The Senate was not even discussing the proposed damage provision, but Senator Robinson alluded to the section in commenting on the need for a penal provision for fine or imprisonment. 80 Cong. Rec. 6348-49 (1936).

[20]*See,* H.R. Conf. Rep. No. 2951, *supra.*

[21]Patman, *The Robinson-Patman Act* 325 (1938). An examination of the House Conference Report No. 2951 (*see* immediately preceding footnote) shows that there was an immense amount of legislative bargaining and comprise. The House Bill and the Senate Bill were very different before they went to the Conference Committee. Many of the similarities of the two bills had disappeared once they had been reported out of their respective House and Senate Judiciary Committees. Therefore, legislative bargaining was a necessity in order to get the Act passed.

[22]For example, the Conferees could have deleted that provision because of their belief that it was a fairly mild provision and that under the Clayton Act a court could already apply the minimum damage rule and also award consequential damages where appropriate. Or, in order to avoid a prolonged fight by a minority of House Members, the Senate could have agreed to the deletion of that damage language despite the

courts do not need specific Congressional authorization to permit proof of damages in the minimum amount of the discrimination.[23] To require specific authorization would be tantamount to turning over to Congress the judge's function of ruling on the admissibility of evidence. Chrysler's rationale that the deletion of the provision on damages from the Robinson-Patman Act indicates Congressional intent to prohibit a court's use of the minimum damage rule is pure speculation.

The proposed damage provision was considered by the Conferees as a "new" measure of damages only because it was contained in the proposed Robinson-Patman Act and worded differently from Section 4 of the Clayton Act. The proposed damage provision was originally "automatic" in the sense that proof of injury was not necessary. To remedy that problem, the proposed bill was amended to add the language "where the fact of damage is shown."[24] However, that language did not cure the obvious situation where there may have been some damage, but it would have not been the total amount of the price discrimination. In that case, the proposed damage provision would still require the amount of the price discrimination to control. Under the Clayton Act and the minimum damage rule, the courts and juries had, and still have, flexibility to permit the amount of damages in the amount of price discrimination, or greater or lesser sums, depending upon the situation.

An examination of the legislative history shows it is, at best, very confusing. Chrysler cites as support Mr. Teegarden's amendment to the proposed damage clause, where he added the words "where the fact of damage is shown" (Res. Br. 20, n. 17). The House Judiciary Committee eliminated that entire clause without any comment whatsoever, even though

---

fact that the intent of a minority of both Houses of Congress would have been to permit the minimum damage rule. Or, the conferees might have had no real reason other than feeling it was superfluous.

[23]*See, Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751 (1947); *See also, Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc.*, 203 F.Supp. 92, 100 (E.D. Mich. 1962).

[24]*See*, Res. Br. 19-20, n. 17.

that subsection required proof of actual damage. Following Chrysler's logic, because the Committee eliminated that Subsection (d) on damages, which contained language requiring proof of actual antitrust injury, one might argue that, therefore, the House rejected the requirement that a Robinson-Patman Act plaintiff must prove the fact of injury, but would permit the injury to be shown by the mere fact of a price discrimination. Use of "negative" legislative history is ill-advised.

In view of Mr. Patman's intimate knowledge of why Congress eliminated the damage clause, and in view of the purpose of the Act to "restore, so far as possible, equality of opportunity in business by strengthening antitrust laws . . . against . . . unlawful . . . price discrimination . . .",[25] the reaffirmance of the minimum damage rule harmonizes with the policy and purpose of the Act.

IV. Courts Have Inherent Authority To Determine The Best Method To Be Used In Proving Damage.

The application of the minimum damage rule is a judicial determination of the best evidence by which the plaintiff can prove a Congressionally mandated remedy. The issue here is th *evidentiary means* of accomplishing the remedy already provided by Congress. Courts have inherent authority to determine the best and "legal" evidence of proving what is, or is not, prohibited by statute. The use of the minimum damage rule would not "open the floodgates" of litigation as Chrysler would have this Court believe. Injury under § 4 of the Clayton Act still must be proved, and unless the injury is supported by the price discrimination and other corroborating evidence, a plaintiff would be foolish to get into a complex antitrust lawsuit.

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), cited by Chrysler (Res. Br. 26), is distinguishable from the instant situation for two important reasons. First, the Court

[25]H.R. Rep. No. 2287, 74th Cong. 2d Sess. 3 (1936).

there was faced with construing the Robinson-Patman Act so as to extend federal jurisdiction into an area of previous state control. To rule with the plaintiff's contentions in *Copp Paving,* this Court would have had to overrule *all* the Courts' of Appeals previous interpretations of the Act limiting its coverage to those transactions actually occurring in interstate commerce. Secondly, in our case, the Congressional purpose mandated in the Act will be better effectuated by the Court's reaffirming the minimum damage rule rather than by the Court's restriction of damages only to the amount of lost sales and profits.[26]

V. Case Law Prior To Passage Of Robinson-Patman Act Permitted The Minimum Damage Rule.

At the time of the passage of the Robinson-Patman Act in 1936, existing law permitted the assessment of minimum damages in the amount of the price discrimination. In *American Can Co. v. Ladoga Canning Co.,* 44 F.2d 763 (7th Cir. 1930), the Court discussed the element of damages that could be assessed in a price discrimination case under the Clayton Act prior to its amendment by Robinson-Patman Act. In that case, the plaintiff had tried to prove lost sales, but could not precisely do so. Defendant argued that the evidence failed to show that the plaintiff suffered any damage by virtue of the price discrimination, and that the proper rule of damages would not permit damage in the amount of the price discrimination. Nevertheless, the Seventh Circuit held that the jury may award damages in the amount of the price discrimination. *Id.* at 769.

The *Ladoga* Court discussed the plaintiff's difficulty in proving damages and the necessity of using circumstantial evidence supplemented by inferences deduced from the evidence. Because the defendant's wrong caused plaintiff difficulty in proving damages, the Court held the defendant cannot take refuge behind the alleged uncertainty or indefiniteness of plaintiff's

---

[26]*See,* Pet. Br. 17-21, concerning the policy and purpose of the Act.

proof, and held that damages could be awarded in the amount of the price discrimination. Thus, *Ladoga* supports the fact that under Section 4 of the Clayton Act,[27] courts in price discrimination cases have long permitted the minimum damage rule.

VI. The Minimum Damage Rule Better Effectuates The Purpose Of The Act And Is Supported By The Sherman Act Cases.

A cardinal rule in the antitrust law is that damages cannot be denied an injured party simply because that party cannot calculate them with absolute certainty. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). This Court has continued to be flexible in permitting proof of the approximate amount of damages once an inference of causal connection of the damage has been shown. *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[28] (sufficient evidence present from which a jury can *infer* the necessary causal connection between violation and injury); *Bigelow v. RKO Radio Pictures Inc.*,[29] (once a violation proved which has a *tendency* to injure plaintiff, there is a reasonable inference that such an act did cause damage to plaintiff); *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[30] (permits a just and reasonable inference of damage from a *tendency* of the defendant's acts to injure the plaintiff). Because of the difficulty of proving damages in private Robinson-Patman actions,[31] the minimum damage rule

---

[27]The district judge, in *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 990, n. 9, *aff'd* 87 F.2d 919 (5th Cir.), *mod. on other grounds and reh. den.* 190 F.2d 63 (5th Cir.), *cert. dismissed* 342 U.S. 875, also recognized that the minimum damage rule ("general damage" rule) was permitted under § 4 of the Clayton Act long before the Robinson-Patman Act was passed.

[28]370 U.S. 690, 700 (1962).

[29]327 U.S. 251, 264-265 (1946).

[30]395 U.S. 100, 123-125 (1969).

[31]*See*, Pet. Br. 20, setting out the number of cases plaintiffs have won in private actions from 1936-1961. Also, Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 383 (1970), wherein the number

would enhance the policy of providing an adequate remedy when the plaintiff has been damaged but could not otherwise specifically prove lost sales and profits or other consequential damages.

It would be almost impossible to precisely measure the competition and the effect of the discrimination on Payne because of the multitude of factors.[32] Even if such an analysis were made, it would be speculative at best. This Court's flexible rule permitting inference of injury harmonizes with Congressional policy and this Court's policy of encouraging private attorneys general to enforce the Robinson-Patman Act. Since the Robinson-Patman Act was passed in order to strengthen the Clayton Act as it applies to individual competitive situations,[33] fulfillment of that purpose militates in favor of reaffirming the minimum damage rule.

Respondent's claim that the cases of *Illinois Brick* and *Hanover Shoe* are not applicable to the Robinson-Patman Act (Res. Br. 37-38) is incorrect. Those cases hold that the illegal cost difference is *prima facie* proof of damage and emphasize the policy which permits easier, less costly and less complicated antitrust enforcement. If the disadvantaged purchaser passes on the higher price, that does not bar his recovery under the Robinson-Patman Act, just as a "pass-on" defense is not a bar

---

of Robinson-Patman Act private cases which have been tried and won by the plaintiff are listed for several years:

1964	170 Tried;	8 Won
1965	90 Tried;	16 Won
1966	107 Tried;	17 Won
1967	79 Tried;	13 Won
1968	79 Tried;	11 Won

[32]Such as the various types and amounts of dealers costs, used car trade-in values, supply and demand, subjective customer preferences, total retail sales price, and dealer location. This is exactly the type of analysis that this Court rejected in the cases of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), because of its inaccuracy, excessive expense, difficulty, and time consuming nature.

[33]Sen. Rep. No. 1502, 74th Cong. 2d Sess. (1936); H. R. Rep. No. 2287, 74th Cong. 2d Sess. (1936); *E. Edelman & Co. v. F.T.C.*, 239 F.2d 152, 155 (7th Cir.), *cert. denied*, 355 U.S. 941 (1958).

under the Sherman Act. The disadvantaged purchaser passing on the higher price will still lose volume in its sales, be less able to compete, or offer less services. Plaintiff is damaged in fact by this higher cost because it lessens its opportunities to maximize profits.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969), also supports Payne. In *Perkins,* the price discrimination occurred when defendant sold to its first level subsidiary at prices lower than defendant sold to plaintiff. The first level subsidiary passed the price advantage on to another subsidiary at plaintiff's level of competition, which could then undersell plaintiff. The Court gave effect to the alter-ego theory so that the wrongdoer could not escape liability by merely setting up a series of controlled corporations, the last of which sold below plaintiff's prices at plaintiff's level of competition. Therefore, *Perkins* is not contrary to *Hanover Shoe* and did not validate a "pass-on" defense in a Robinson-Patman Act case. The "pass-on" defense is irrelevant to secondary line Robinson-Patman Act cases since the disfavored customer is injured even if he passes-on the higher charge.

VII. Prior To This Decision By The Fifth Circuit, Most Appellate Courts Did Not Preclude Use Of The Minimum Damage Rule.

Enterprise Industries v. Texas Co., 240 F.2d 457, 459-460 (2d Cir.) *cert. denied,* 353 U.S. 965 (1957), the leading case relied upon by both Chrysler and the Fifth Circuit, recognized that an inference of injury may be proved by price discrimination plus some "more" evidence. *Enterprise,* therefore, does not actually contradict *F.T.C. v. Morton Salt Co.,* 334 U.S. 37 (1948) or *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 757 (1947). When there are "extraordinary circumstances," the amount of price discrimination not the minimum amount of damages. When plaintiff failed to show anything except mere price discrimination in *Enterprise,* the court was merely recognizing that those "circumstances" were presented.

In applying the minimum damage rule, the Eighth Circuit in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*,[34] thoroughly analyzed and distinguished *Interstate Commerce Commission v. United States,* 289 U.S. 385 (1933), and other ICC cases. The Eighth Circuit held that failure to use the minimum (general) damage rule would weaken the statute. However, the minimum damage standard does not mean that, in every case, minimum damages are recoverable whenever there is a price discrimination. The Eighth Circuit in *Elizabeth Arden,* and later in *American Can Co. v. Russellville Canning Co.,* 191 F.2d 38, 55 (8th Cir. 1951),[35] recognized there would be instances where the minimum damages would not be recoverable.

Prior to the decision of the Fifth Circuit in this case, the majority of the appellate courts favored the minimum damage rule opposed by Chrysler.[36] Cases cited by Chrysler (Res. Br.

---

[34]150 F.2d 988 (8th Cir. 1945). The Eighth Circuit analyzed the various ICC cases and concluded that under the Interstate Commerce Act, a plaintiff can only recover damages if it proves "special" damages to its business. However, a Robinson-Patman Act plaintiff need not prove "special damages." The nature of the Interstate Commerce Act prohibited recovery of anything except "special" damages because it was primarily aimed at prohibiting a carrier from rebating money to the shipper. The granting of a general damage award based on price discrimination alone would be, in effect, the same as authorizing a prohibited rebate, especially since all shippers are not in competition with one another. 150 F.2d at 995-996.

[35]*American Can Co. v. Russellville Can Co.,* 191 F.2d 38 (8th Cir. 1951), did not overrule *Elizabeth Arden* as claimed by Chrysler (Res. Br. 31-32). The Eighth Circuit was faced in *Russellville* with what *Bruce's Juices* referred to as "extraordinary circumstances." The *Russellville* court held that since the plaintiff and one of the favored purchasers were not in competition with each other, and since the freight equalization in question actually benefited plaintiff in its sales with respect to some of its competitors, then the amount of the discrimination would not be the proper measure of damages. The court recognized that, in the normal situation, damages would be the amount of the price discrimination, but found that this was not the normal situation. 191 F.2d at 55. It is generally accepted that *Russellville* did not overrule its decision in *Elizabeth Arden. See,* Comment, *Damages Under The Robinson-Patman Act,* 31 Md. L. Rev. 60, 76-77 (1971), containing an extensive discussion of the *Elizabeth Arden* and the *Russellville* decisions.

[36]The following appellate decisions support the minimum damage rule or only reject damages in the amount of the price discrimination when there are "extraordinary" circumstances:

28-29; n. 25) as following the *Enterprise* decision do not reject the reasoning in *Enterprise* that an *inference* of the fact of injury can be shown from price discrimination plus other supporting evidence. Those cases cited by Chrysler[37] which refer

---

Supreme Court – *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947).

Fifth Circuit – *American Can Co. v. Bruce's Juices*, 187 F.2d 919, 924 (5th Cir. 1951), *modified on other grounds, rehearing denied*, 190 F.2d 73, *cert. dismissed*, 342 U.S. 875 (1952).

Seventh Circuit – *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976).

Eighth Circuit – *Elizabeth Arden Sales Corp v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.) *cert. denied*, 326 U.S. 773 (1945). *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55 (8th Cir. 1951). There was no evidence supporting the fact of actual damage, or from which the jury could have inferred the fact of actual damage, so this again is a case where the unusual circumstances mentioned in this Court's decision in *Bruce's Juices occur.* In fact, the Eighth Circuit did recognize that the normal situation would present a case where the price differential would be the minimum amount of damages. 191 F.2d at 55.

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979), does not reject the minimum damage rule as claimed by Chrysler in its Brief (Res. Br. 29 n. 25). In *Zwicker* the Court held that the damage allegedly resulting from the price discrimination was not supported by the evidence, and never discussed the general damage rule or any cases. *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶ 63,367 (D. Minn. 1980), held that the rebates reducing the prices charged the competitors were equally available to all competitors, so there could be no damages.

Ninth Circuit – *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). This case is not overruled in any way by *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975), as Chrysler claims (Res. Br. 34-35). *Rutledge* merely cited general cases showing the need to prove injury without discussing the general or special damage rule. *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶ 63343 (E.D. Wash. 1980), also cited by Chrysler, has been appealed to the Ninth Circuit.

[37]Res. Br. 28-29 n. 25. The Fifth Circuit did not reject the minimum damage rule until the instant case. In *McCaskill v. Texaco*, 351 F. Supp. 1332 (S.D. Ala. 1972), *aff'd, sub nom. Harrelson v. Texaco*, 486 F.2d 1400 (5th Cir. 1973), does not hold contrary to the Fifth Circuit's *American Can* case. In *McCaskill*, the District Court decided that the Robinson-Patman claim on a Motion for Summary Judgment in favor of defendant under the "meeting competition" defense. 351 F. Supp. at 1340. It then gratuitously expressed in *dictum* its opinion that the price differential in that case should not be the measure of damages. Since the Fifth Circuit affirmed without opinion under Local Rule 21, its affirmance of the District Court's opinion is without much precedential value.

to *Enterprise* reject only the theory that proof of injury can result from mere price discrimination alone.

VIII. Price Discrimination Injures The Economic Opportunities Of The Disfavored Purchaser.

The most important factor overlooked by Chrysler in its reliance on the *Enterprise* case and its progeny is that a business is usually injured in fact[38] in its competitive opportunities when its competitors have been able to buy the same merchandise at less cost. Even if the price discrimination is not reflected in the retail sales price, the normal result is to prohibit the disfavored purchaser from reducing its sales price, while keeping its same profit margin, and, hence, increasing its sales volume and profits. The fact that the favored customer did not reduce its sales price and perceptively take away customers from the disfavored purchaser ignores economic realities.

Commentators support the fact that, in the usual competitive market place, a disfavored purchaser is actually injured in the marketplace, regardless of whether or not that purchaser loses sales:

> Firms that fail to operate at lowest costs may temporarily break even or even make modest profits when demand is high, but will incur losses and eventually disappear when resources commanded by more efficient firms move into the market.[39]

Chrysler contends that under such an analysis, the more you sell, the more damages you incur. This is not true, certainly not in this case. Without the unjustifiably high quotas which

---

[38]*State Wholesale Groceries v. Great Atlantic & Pacific Tea Co.*, 202 F. Supp. 768 (N.D. Ill. 1961), is a § 2 (d) case, and is almost identical to the instant situation since Payne did not receive as large a rebate as its competitors. The court held in *State Wholesale:*

> As a result of the violation, the nonfavored customer is left with less in its treasury—less in profits, less to carry on its business, less in reserve. The non-favored dealer has less money than he would otherwise have, and therefore, has been damaged.

[39]Areeda and Turner, *Antitrust Law*, Vol. 2, p. 270, ¶ 402 (b) (2) (1978).

Chrysler imposed on Payne, it would have suffered no price discrimination because it would have gotten an equal rebate per car sold. In the normal competitive market, the disfavored purchaser could not sell more and more cars and become more and more damaged. If the market were so inelastic and demand were so great that price did not affect the volume sold, then such facts may be the "extraordinary circumstances" in which the amount of the price discrimination may not be the amount of the damage. Under both the Fifth Circuit's reasoning and Chrysler's reasoning, Payne would have the burden of proving that these "extraordinary circumstances" did not exist, and then must also prove it lost sales and profits. Such a burden undermines the purpose of the Act.

IX. *Brunswick* Does Not Require This Court To Eliminate The Minimum Damage Rule.

Chrysler seeks to artificially narrow this Court's concept of antitrust injury in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *Brunswick* was a Section 7 Clayton Act case, not a Robinson-Patman Act case, and does not prohibit the use of the minimum damage rule in a Robinson-Patman Act case. The question presented in *Brunswick* was "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market shares." (*Id.* at 484). The Third Circuit had held that any loss "causally linked" to the "mere presence of the violator in the market" was compensable.[40] This Court held that only those mergers which may produce anti-competitive effects give rise to a cause of action for damages, reversing the Third Circuit because the purpose of the antitrust law was not to provide recovery for this situation.

In a Robinson-Patman Act secondary line case, the purpose of the Act is to maintain price equality so that every competitor

---

[40]*NBO Industries Treadway Companies v. Brunswick Corp.*, 523 F.2d 262, 272-273 (3rd Cir. 1976).

is on an equal footing in the market. Different prices charged by a manufacturer to competing sellers defeat the very purpose of the Act. Therefore, in the instant case, recovery of damages for price discrimination and injury to Payne is exactly the purpose behind the Act.

X. Payne's Going Concern Value Was Reasonable And Supported By The Evidence.

There was evidence of Payne's going concern value based upon two methods: (1) appreciation of the "goodwill" value of the company, and (2) a capitalization of a stream of profits method.[41] This latter method is specifically approved by the Fifth Circuit. *Terrell v. Household Goods Carrier's Bureau,* 494 F.2d 16, 23, n. 12 (5th Cir. 1969); *Greene v. General Foods Corporation,* 517 F.2d 635 (5th Cir. 1975). Under the judge's charge, Payne could *not* recover for both future profits and going concern value (Tr. 807-808).

The Fifth Circuit's opinion in the instant case overlooks the broad discretion of a trial judge in admitting expert testimony on going concern value. The evidence on that issue is for the jury. *Terrell,* 494 F.2d at 24-25. In order to prohibit the use of minimum damage rule, the Fifth Circuit ignores previously well established case law, which would even permit evidence that "borders on the speculative" in order to estimate damages. *Hobart Brothers Company v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 904 (5th Cir. 1973). Previous decisions of this Court permit damages to be estimated by less than exact evidence.[42] Therefore, the jury verdict of $111,247.48 should stand.

---

[41]Goodwill value alone was $50,000 to $75,000 (Tr. 75-76; 115-116). Dr. Ignatin's first method of determining going concern value was an appreciation of the "goodwill" value from 1955 until the company went out of business in 1974, at which time the going value was $100,000 (Tr. 207-209). Chrysler's own expert economist approved (Tr. 601-603) the second and preferred method used by Dr. Ignatin of capitalizing a stream of profits to determine the goodwill value as of May, 1974 to be $170,000. (Tr. 210-218; 279).

[42]*Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1967); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962); *Bigelow v. RKO Radio Pictures Co.,* 327 U.S. 251 (1946).

CONCLUSION

For the foregoing reasons, the Fifth Circuit's opinion is inconsistent with Congressional intent and with the public policy inherent in enforcing the Robinson-Patman Act. This Court should therefore reverse the Fifth Circuit's opinion and reinstate the jury verdict.

Respectfully submitted,

C. Lee Reeves
Counsel For Petitioner
2222 Arlington Avenue, South
Birmingham, Alabama 35255
(205) 933-7111

CERTIFICATE OF SERVICE

I, C. Lee Reeves, a member of the Bar of this Court, hereby certify that three (3) copies of Petitioner's Reply Brief on the Merits have been separately served upon J. Ross Forman, III, Attorney of Record for Respondent, at 1600 Bank for Savings Building, Birmingham, Alabama 35203, upon John T. Cusack, Attorney of Record for *amicus curiae,* Vanco Beverage, Inc. at One First National Plaza, Suite 3300, Chicago, Illonois 60603, upon Robert H. Whaley, Attorney of Record for *amicus curiae* Hasbrouck, at Fifth Floor, Spokane and Eastern Building, Spokane, Washington 99201, and upon Thomas Y. Davies, Attorney of Record for *amicus curiae,* Cessna Aircraft Company, 200 East Randolph Drive, Room 5800, Chicago, Illinois 60601, by depositing the same in the United States Mail, first-class postage prepaid, and properly addressed on January 13, 1981.

C. Lee Reeves

MOTION FILED
DEC 31 1980

No. 79-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

Of Counsel:
DALE L. BECKERMAN
DEACY & DEACY
1000 Bryant Building
Kansas City, Missouri 64106

THOMAS Y. DAVIES
KIRKLAND & ELLIS
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601

BOWLES & BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

THOMAS E. DEACY, JR.
1000 Bryant Building
Kansas City, Missouri 64106
(816/421-4000)
and
E. HOUSTON HARSHA
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601
and
ALAN I. BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

CHAS. P. YOUNG-CHICAGO

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that the actual injury to competition required in a section 2(a) damage action cannot be presumed from the existence of a price difference.

2. Whether the Court of Appeals correctly held that the "amount of the price discrimination" cannot be used in a section 2(a) damage action as an automatic measure of damages resulting from the price discrimination.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION iv

I. Petitioner Has Refused to Consent v

II. Interest of The Cessna Aircraft Company v

III. Questions of Law that Have Not Been Adequately Presented and Their Relevancy to the Disposition of this Case vii

BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION 1

Statement of Interest and Questions Presented 2

Summary of Argument 2

Argument 5

I. The Fifth Circuit Correctly Held that a Plaintiff Seeking Damages under Section 2(a) Must Prove an Actual Injury to Competition; Such Injury Cannot Be "Inferred" from the Existence of a Price Difference 5

A. The Fifth Circuit Held that Payne Failed to Show Competitive Injury 5

B. A Plaintiff Seeking Damages Must Prove an Actual Substantial Lessening of Competition 6

C. *Morton Salt* Provides No Authority for "Inferring" Actual Competitive Injury in a Damage Action 7

D. The Incipient Competitive Injury Standard of Section 2(a) Is Insufficient for Damage Liability 8

E. A Section 2(a) Plaintiff Must Prove Actual Injury by Probative, Competent Evidence .. 10

F. Since Price Discrimination Is Not a *Per Se* Violation, Actual Competitive Injury May Not Be Presumed 11

G. Neither *Illinois Brick* Nor *Hanover Shoe* Eliminates the Requirement of Proof of Actual Injury to Competition 13

PAGE

II. The Fifth Circuit Correctly Held that the "Amount of the Price Discrimination" May Not Be Taken as the Amount of Damages 16
Conclusion 20

TABLE OF AUTHORITIES

TABLE OF CASES

American Can Co. v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) 14
Automatic Canteen Co. of America v. *FTC*, 346 U.S. 61 (1953) 12, 13
Bel Air Markets v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (D.C. Cal. 1972) 18
Boro Hall v. *Metropolitan Tobacco Co.*, 74 F.R.D. 142 (E.D.N.Y. 1977) 18
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) . 12
Bruce's Juices v. *American Can Co.*, 330 U.S. 743 (1947) *13, 16*
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 3, 4, 5, 6, 7, 8, 9, 14
Carlson Companies, Inc. v. *Sperry & Hutchinson Co.*, 507 F.2d 959 (8th Cir. 1974) 9, 12
Chmieleski v. *City Products Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976) 18
Chrysler Credit Corp. v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), reh. en banc den., 611 F.2d 882 (January 18, 1980), 614 F.2d 1298, 1299 (March 18, 1980) ..... vii, 2, 5, 6, 9, 10
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 12
Dole Valve Co. v. *Perfection Bar Equipment, Inc.*, 311 F. Supp. 459 (N.D. Ill. 1970) 10
Eastman Kodak Co. v. *Southern Photo Co.*, 273 U.S. 359 (1927) 15
Enterprise Industries, Inc. v. *Texas Co.*, 240 F.2d 457 (2d Cir.), cert. den. 353 U.S. 965 (1957) 10, 16
FTC v. *Anheuser Busch, Inc.*, 363 U.S. 536 (1960) 4
FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948). vi, vii, 3, 4, 5, 6, 7, 8
FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963) 11

PAGE

Fowler Manufacturing Co. v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969) 11, 16, 18
Grace v. *E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976).... 19
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 13, 14, 15
Hasbrouck v. *Texaco, Inc.*, 1980-2 Trade Cases ¶63,343 (E.D. Wash. 1980) 19
Hettinger v. *Glass Specialty Co.*, 59 F.R.D. 286 (N.D. Ill. 1973) 18
Illinois Brick Co. v. *State of Illinois*, 431 U.S. 720 (1977) 13, 14, 15
Kelly v. *General Motors Corp.*, 425 F. Supp. 13 (E.D. Pa. 1976) 18
John Lenore & Co. v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) 10
Northern Pacific R. Co. v. *United States*, 356 U.S. 1 (1958) 12
Sano Petroleum Corp. v. *American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960) 17, 18
Shaw v. *Mobil Oil Corp.*, 60 F.R.D. 566 (D.N.H. 1973) ... 18
Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*, 478 F. Supp. 243 (E.D. Pa. 1979), aff'd, ___ F.2d ___, 1980-1 Trade Cases ¶63,611 (3rd Cir. 1980) 10, 13
Van-S Aviation Corp. v. *Louisiana Aircraft, Inc.*, 1976-1 Trade Cases ¶60,759 (S.D. Fla. 1974) 18

Statutes and Other Authorities

15 U.S.C. § 13(a)..... v, vii, viii, 3, 5, 6, 7, 12, 14, 15, 18
15 U.S.C. § 13(c) 12
15 U.S.C. § 13(d) 12
15 U.S.C. § 13(e) 12
15 U.S.C. § 15 ..... v, 3, 6, 7
15 U.S.C. § 18 ..... 9, 10, 12
49 U.S.C. § 2 (repealed 1978)..... 19
Rule 36, Rules of the Supreme Court ..... iii, iv
United States Department of Justice, Report on the Robinson-Patman Act (1976) 13, 17

No. 79-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

The Cessna Aircraft Company ("Cessna") respectfully moves this Court for leave to file BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION, instanter. The grounds for Cessna's motion are stated below pursuant to Rule 36 of the Rules of the Supreme Court.

I. Petitioner Has Refused to Consent

Pursuant to Rule 36 of the Rules of the Supreme Court, Cessna requested petitioner, J. Truett Payne Company, Inc. ("Payne"), and respondent, Chrysler Motors Corporation ("Chrysler"), to consent to the filing of an *amicus curiae* brief by Cessna in support of respondent Chrysler. Petitioner Payne refused to consent. Respondent Chrysler consented.

II. Interest of The Cessna Aircraft Company

Cessna is interested in this case because Cessna is a defendant in class action litigation alleging price discrimination which involves certain legal issues similar to those involved in the case at bar. Specifically, Cessna is a defendant in two actions consolidated by the Judicial Panel for Multidistrict Litigation in the Western District of Missouri, Western Division, as *In re Cessna Aircraft Distributorship Antitrust Litigation,* M.D.L. 123. The principal allegation in this litigation relates to Cessna's "dual" distribution system during the relevant period. In certain areas of the country, Cessna sold aircraft through its own zone offices to contracted retail dealers ("zone dealers"). In other areas of the country, Cessna sold aircraft to independent wholesale distributors who, in turn, sold to dealers. Plaintiff, a zone dealer, alleges that certain independent distributors sometimes sold aircraft directly to retail customers, rendering the wholesaler's discount they received from Cessna discriminatory. Insofar as Cessna can presently determine, plaintiffs allege approximately 3,100 such "favored" aircraft sales to some 15 distributors and seek damages based on approximately 20,000 sales to the approximately 1,500 class member dealers. These allegations involve aircraft of widely differing types ranging in price from $7,000 to $250,000. In all, plaintiff claims damages to class members calculated on an "automatic" damage theory of approximately $37 million, trebled to approximately $111 million.

On June 5, 1974, the Hon. William H. Becker, United States District Judge, certified this litigation to proceed as a class action. That class action ruling was predicated, in part, on the District Court's acceptance of plaintiff's assertions that

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948), allowed an inference of injury to competition under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and of injury to the business or property of class members under section 4 of the Clayton Act, 15 U.S.C. § 15, and, further, that damages could be determined based on the "amount of discrimination," thus dispensing with the need for individual proof with regard to each class member. It is Cessna's position that such "inferences" are erroneous as a matter of law.

In the case at bar, Payne and two *amici curiae* in support of Payne, Vanco Beverage, Inc. ("Vanco") and Ricky Hasbrouck, et al. ("Hasbrouck"),* have explicitly urged this court to hold that the requirement of injury to plaintiff's business set forth in section 4 may be "inferred" once price discrimination is proven. They have also urged the Court to hold that the "amount of the price discrimination" may be used as an automatic measure of damages. In the context of the case at bar, there is also a third implicit request: namely, that this Court allow proof of price discrimination to give rise to a presumption of the "substantial lessening of competition" required by section 2(a). As described below, this request is inherent in Payne's argument because the Court of Appeals for the Fifth Circuit explicitly held that Payne failed to prove the requisite injury to competition. Thus, unless this Court is willing to create a presumption of injury to competition, the Fifth Circuit's decision must be affirmed. Cessna submits that each of these three legal issues is potentially significant to the issues of antitrust injury, damages, and the propriety of class certification in the Cessna litigation—and is of potential importance in other Robinson-Patman litigation involving class allegations.

---

* The Court has previously granted leave for Vanco and Hasbrouck to each file a brief *amicus curiae* in support of petitioner, Payne.

III. Questions of Law that Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case.

The briefs filed by Payne, Vanco, and Hasbrouck all fail to squarely address a critical holding of the United States Court of Appeals for the Fifth Circuit in *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (1979), reh. en banc den. 611 F.2d 882 (January 18, 1980), 614 F.2d 1298, 1299 (March 18, 1980). The Fifth Circuit expressly held that Payne failed to prove the substantial injury to competition required by section 2(a):

> *"When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result.* Both the statute and the Courts recognize this. 15 U.S.C. § 13(a).... Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competition.... As discussed above, *there is no evidence, much less substantial evidence, that such was the case here. Id.* at 1136 (citations omitted; emphasis added).

Moreover, the Fifth Circuit explicitly rejected Payne's claim that *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), allows any inference or presumption of the requisite injury to competition in a private action for damages. The Fifth Circuit held that:

> "In order to recover damages, Payne had to show *more than just a threat of* antitrust injury. As discussed above, it failed to do so." *Id.* at 1136-37 (emphasis added).

Despite this clear holding, petitioner Payne and amici Vanco and Hasbrouck each address this Court as if there were no issue regarding proof of the requisite substantial injury to competition.

Payne's erroneous statement of the Fifth Circuit's holding obscures the potentially broad ramifications which the case at bar carries for private damage actions under section 2(a).

Although Payne and its supporting amici do not acknowledge it, they are necessarily asking this Court to do nothing less than discard the clear statutory mandate that limits liability in private damage actions under section 2(a) to those price discriminations which a plaintiff proves have caused actual substantial injury to competition resulting in antitrust injury to plaintiff's own business; *i.e.*, situations where a plaintiff has suffered business injury flowing from the proven injury to competition. Implicitly, Payne and its amici would have this Court transform price discrimination into a *per se* antitrust violation—comparable to price fixing—in which the price discrimination itself is *presumed* to cause the requisite injury to competition. Cessna respectfully suggests that such an important issue should not be decided implicitly.

As a defendant in section 2(a) litigation certified as a class action, Cessna is interested in a correct resolution of the issues that arise in this case. In addition, as a defendant in a class action context, Cessna can offer a unique perspective on the potential significance of the issues involved in the case at bar. Because this Court's opinion may have a profound influence on the interpretation of the elements of section 2(a) liability in private damage actions, it is important that the Court be presented with the fullest possible view of the issues.

Respectfully submitted,

THOMAS E. DEACY, JR.

Of Counsel:

DALE L. BECKERMAN
DEACY & DEACY
1000 Bryant Building
Kansas City, Missouri 64106

THOMAS Y. DAVIES
KIRKLAND & ELLIS
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601

BOWLES & BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

THOMAS E. DEACY, JR.
1000 Bryant Building
Kansas City, Missouri 64106
(816/421-4000)
and

E. HOUSTON HARSHA
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601
and

ALAN I. BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

No. 79-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

Of Counsel:

DALE L. BECKERMAN
DEACY & DEACY
1000 Bryant Building
Kansas City, Missouri 64106

THOMAS Y. DAVIES
KIRKLAND & ELLIS
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601

BOWLES & BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

THOMAS E. DEACY, JR.
1000 Bryant Building
Kansas City, Missouri 64106
(816/421-4000)
and
E. HOUSTON HARSHA
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601
and
ALAN I. BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

CHAS. P. YOUNG-CHICAGO

No. 79-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

The Cessna Aircraft Company ("Cessna") incorporates by reference the Statement of Interest and Questions of Law That Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case set forth in paragraphs II and III, respectively, of Cessna's MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE which immediately precedes and is bound together with this Brief.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in the case at bar, *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), reh. en banc den., 611 F.2d 882 (January 18, 1980), 614

F.2d 1298, 1299 (March 18, 1980), held that petitioner, J. Truett Payne Company, Inc. (hereinafter "Payne"), had to prove *actual* antitrust injury to establish damage liability for price discrimination and that Payne failed to meet that burden of proof. Both the Court of Appeals' holding that *actual* antitrust injury must be proven and its conclusion that Payne failed to prove such injury are correct and should be affirmed.

A plaintiff in a private damage action must prove injury to establish liability for price discrimination. The requisite showing of injury has two statutory sources. First, under section 4 of the Clayton Act, 15 U.S.C. § 15, a private plaintiff must prove that it suffered *actual* injury to its business. As this Court held in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), however, only *antitrust* injury satisfies the injury requirement of section 4. The definition of what constitutes "antitrust injury" must necessarily be drawn from the relevant antitrust statute itself. Thus, the second statutory source for defining the requisite injury is section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). The type of antitrust injury that section 2(a) is intended to forestall is a "substantial lessening of competition." Hence, reading the two statutory requirements together, as mandated by *Brunswick*, it is clear that a private plaintiff seeking damages under section 2(a) must prove that plaintiff suffered business injury flowing from an *actual* substantial lessening of competition caused by the price discrimination. No lesser showing would suffice.

In the case at bar, the Fifth Circuit held that Payne failed to prove antitrust injury. Neither Payne nor the *amici* supporting Payne acknowledge that fact. Instead, they rely on the assertion that the requisite injury to competition may be "inferred" under the authority of *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). They then proceed to their arguments regarding section 4 and "automatic damages" as if lack of proof of injury to competition were no obstacle to their success. Indeed, Payne casts its argument as though actual injury to competition had been established and as though it is only asking the court to permit an inference that Payne itself

suffered injury as a result. Such is not the case. The assertion that antitrust injury can be inferred was squarely rejected by the Fifth Circuit and is in conflict with this Court's teaching in *Brunswick*. Neither *Morton Salt* nor any other authority permits an "inference" of *actual* substantial injury to competition, which is the prerequisite for damage liability.

In the context of the case at bar, what Payne really asks this Court to do is to create a series of totally unprecedented presumptions regarding antitrust injury and damages which would be triggered by a simple showing of a price difference.* For Payne to prevail, this Court would have to agree that mere proof of a price difference would give rise to two bootstrapped presumptions. First, that proof of a price difference would itself give rise to a presumption of actual injury to competition. Second, that proof of a price difference would itself give rise to a presumption of *antitrust* injury to the disfavored purchaser's business. In sum, Payne cannot prevail unless this Court is willing to transform price discrimination into a *per se* antitrust violation comparable to price-fixing—*i.e.*, to presume that anticompetitive effects are inherent in a price difference itself. Cessna submits that any such transformation would not only violate the clear intent of Congress, but would work extreme injustices in the marketplace.

In addition to presumption of injury, Payne also contends that proof of a price difference should give rise to a presumption that the amount of the price difference constitutes the amount of the damages actually suffered by plaintiff. That contention is entirely dependent upon the presumption of injury; it necessarily fails when the underlying assertion of "inferred" injury to competition fails. Where a plaintiff is able to prove that a price difference actually injured competition, the adverse competitive effect proven will suggest the appropriate measure of damages. The appropriate measure of

---

* Under section 2(a), a price "discrimination" is simply a price "difference" and has no pejorative character unless all the elements of section 2(a) are involved. *FTC* v. *Anheuser-Busch, Inc.* 363 U.S. 536, 549 (1960).

damages need not bear any resemblence to "the amount of the price discrimination."

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT A PLAINTIFF SEEKING DAMAGES UNDER SECTION 2(a) MUST PROVE AN ACTUAL INJURY TO COMPETITION; SUCH INJURY CANNOT BE "INFERRED" FROM THE EXISTENCE OF A PRICE DIFFERENCE.

A. The Fifth Circuit Held that Payne Failed to Show Antitrust Injury.

The Fifth Circuit explicitly held that Payne failed to prove that it suffered antitrust injury; *i.e.*, failed to prove that the alleged price discrimination caused the requisite substantial injury to competition and that Payne was injured as a consequence of such lessening of competition. Citing the teaching of *Brunswick*, the Court of Appeals stated in pertinent part:

> "[T]he antitrust laws do not provide a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. *When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result.* Both the statute and the courts recognize this. 15 U.S.C. § 13(a). . . . Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. . . . As discussed above, *there is no evidence, much less substantial evidence, that such was the case here.*" 607 F.2d 1136 (citations omitted; emphasis added).

Moreover, the Fifth Circuit explicitly rejected Payne's reliance on *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), for the

proposition that the requisite substantial injury to competition could be "inferred" from proof of price discrimination itself. The Fifth Circuit held:

> "Payne's reliance on *FTC* v. *Morton Salt Co.* and its progeny is misplaced. . . . [T]he showing necessary to establish a section 2(a) violation is not the same as the showing necessary to support a private action for damages. . . . *What Morton Salt found inferable from a substantial price difference was a threat to competition* sufficient to violate the statute. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order *to recover damages, Payne had to show more than just a threat* of antitrust injury. . . . [I]t failed to do so." 607 F.2d at 1136-37 (citations omitted; emphasis added).

Remarkably, Payne and the *amici* supporting Payne fail to squarely address this dispositive aspect of the Court of Appeals' holding. Indeed, if one were to read only their briefs, one might easily come away with the serious misperception that no issue existed regarding the sufficiency of Payne's showing of the requisite injury to competition.* To the contrary, the Court of Appeals found there was such an issue and decided it correctly against Payne.

B. A Plaintiff Seeking Damages Must Prove an Actual Substantial Lessening of Competition.

In *Brunswick*, this Court held that section 4 only permits recovery of treble damages for "antitrust injury." Antitrust injury means, in part, injury that flows from the actual

---

* Payne's brief discusses the Fifth Circuit's holding as though it rested only on section 4 of the Clayton Act. Payne's Brief, at 11, cites the Court of Appeals' opinion for the proposition that it is a section 4 issue. The page in the opinion which Payne cites (607 F.2d at 1136) is the page where the Fifth Circuit explicitly holds that Payne failed to prove injury to competition under "15 U.S.C. § 13(a)."

The brief *amicus curiae* filed by Vanco Beverage, Inc., not only fails to squarely address the Fifth Circuit's holding but also states that "a demonstration of likelihood of competitive injury" is "an element of the offense which the Fifth Circuit assumed to have been established." Vanco Brief at 13, n. 2. What Vanco omits to say is that the Fifth Circuit held a mere "likelihood" of such injury to be insufficient to support a damage claim.

adverse economic consequences of various practices which the antitrust laws were intended to forestall. 429 U.S. at 487-88. Hence, a proper definition of "antitrust injury" requires the intermeshing of the remedial statutory provisions of section 4 with the substance of the antitrust injury addressed by the various antitrust statutes. 429 U.S. at 486. The type of injury which section 2(a) was intended to prevent is the diminution of competition. 15 U.S.C. § 13(a). Thus, in order for injury to flow from a diminution of competition, there must first be an *actual* diminution of competition resulting from a price discrimination.

Without squarely addressing the implications of *Brunswick* for determining the boundaries of "antitrust injury," Payne asks this Court to allow the requisite showing of injury to competition to be "inferred" from proof of a price difference:

> "The plaintiff in a private price discrimination action must only prove sufficient price discrimination from which a jury can infer injury to competition. This inference of injury to competition is regularly permitted in public cases enforcing § 2(a) of the Robinson-Patman Act. *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). An injury to competition is inferred where there is substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price. When a plaintiff shows injury to competition, he simultaneously shows injury to his business or property for purposes of recovering damages under § 4 of the Clayton Act." (Payne Brief at 9.)

As discussed below, Payne's reliance on *Morton Salt* is misplaced.

C. *Morton Salt* Provides No Authority for "Inferring" Actual Competitive Injury in a Damage Action.

Even if *Morton Salt* might provide authority for inferring a *probability* of a substantial lessening of competition sufficient for injunctive relief, it has no applicability to a damage

action. A mere showing of a threat to competition is insufficient proof of actual antitrust injury to establish liability in a private damage action.

The context in which *Morton Salt* arose demonstrates its inapplicability to private damage actions. After the Federal Trade Commission had held an administrative hearing in which it concluded that the price differential in question posed a threat of a lessening of competition, the Commission issued a cease and desist order to forestall injury to competition. When that order was set aside by the Court of Appeals, this Court granted certiorari. 334 U.S. at 39-40. It was in this injunctive context that this Court stated that the Commission need not find actual injury to competition to support its order, "but only that there is a reasonable possibility" that such injury may occur. *Id.* at 46. Of course, the actual injury requirement for damage liability under section 4 was not involved in *Morton Salt*.

Moreover, in reaching its finding of potential injury to competition, the Commission considered a variety of information regarding the commercial context in which the difference in price occurred. In all, the Commission received two thousand pages of testimony largely devoted to the issue of injury to competition. *Id.* at 50. This is the setting of the so called "inference" of injury upon which Payne would rely. This Court did not accept a perfunctory conclusion in *Morton Salt*. Rather, it accorded substantial weight to the Commission's consideration of the totality of the evidence and to the Commission's exercise of the expertise committed to it as "a body of experts" in drawing conclusions from the specific facts presented. *Id.* at 54. No such considerations apply to private damage actions.

D. The Incipient Competitive Injury Standard of Section 2(a) Is Insufficient for Damage Liability.

The Commission's purported use of an "inference" of a probability of a lessening of competition *in futuro* has no relevance to a damage action. Under the teaching of *Brunswick*, satisfaction of the "incipiency" standard of section 2(a) is insufficient to show the *actual* antitrust injury required for

damage actions brought under section 4. Speaking in *Brunswick* of the probable lessening of competition standard of section 7 of the Clayton Act, 15 U.S.C. §18—a standard which is virtually identical to the language of section 2(a)—this Court stated that mere proof of an incipient injury is insufficient to allow liability for damages:

> "Plainly, to recover damages respondents must prove more than that petitioner violated § 7 since such proof establishes only that injury may result." 429 U.S. at 486.

Moreover, the analysis underlying *Brunswick* makes it clear that proof of only a probability of substantial competitive injury—*i.e.*, the incipient injury standard of section 2(a)— cannot suffice for the proof of actual injury to competition required in light of section 4. Since the claimed injury to plaintiff's business must *flow from* and *be of the same type as* the injury intended to be forestalled, 429 U.S. at 477, it necessarily follows that a private plaintiff seeking damages must prove that there was an *actual* substantial lessening of competition and that the plaintiff was one of the competitors whose competitive position was *actually* injured. Clearly an *actual* injury to the plaintiff cannot flow from and be of the same type as a merely *potential* injury to competition. If there was no *actual* injury to competition, then the injury claimed by plaintiff necessarily flows from some other cause.

The Fifth Circuit clearly made the same analysis and reached the same conclusion. Reasoning from *Brunswick*, the Fifth Circuit concluded that, although proving a price discrimination "which threatens competition but which has not caused any actual competitive injury" may be sufficient to show a "violation" of the statute, it is not sufficient to support an action for damages. The Court of Appeals concluded that, "In order to recover damages, Payne had to show *more than just a threat* of antitrust injury." 607 F.2d at 1136-1137 (emphasis added).

Similarly, in *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 507 F.2d 959, 961-962 (8th Cir. 1974), a pre-*Brunswick* decision, the Eighth Circuit concluded that a potential injury

to competition under the incipiency standard of section 7, even though sufficient to create an antitrust violation for injunctive purposes, does not suffice for a damage action under section 4. *See also John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 499 (9th Cir. 1977).

E. A Section 2(a) Plaintiff Must Prove Actual Antitrust Injury by Probative, Competent Evidence.

Because an *actual* competitive injury must be proven, a plaintiff seeking damages under section 2(a) must produce competent evidence showing that the alleged price discrimination had an actual adverse impact on competition. As the Fifth Circuit correctly observes, the most obvious types of evidence that could show actual competitive injury would be evidence that the favored competitor actually used his price advantage to divert a substantial volume of sales from the disfavored competitor or evidence of a substantial decline in the disfavored competitor's profitability resulting from his lowering of prices to meet the favored competitor's lowered prices. In any event, there must be evidence showing that the favored competitor *actually used* the discriminatory discount to the detriment of competition with disfavored competitors.* 607 F.2d at 1136. *See also Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F. Supp. 243, 273-76 (E.D. Pa. 1979), aff'd,___ F.2d ___, 1980-1 Trade Cases (CCH) ¶63,611 at 77,237n. 6 (3rd Cir. 1980); *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457, 460 (2nd Cir. 1957).

Insofar as the evidence in the case at bar is set forth in Payne's brief, it does not appear that Payne offered any substantial evidence of an adverse effect on his sales or profits. The market share data Payne recites reflects only apparently

---

* Payne suggests that a customer who pays a lower price *might* use the price difference to strengthen its competitive position indirectly. Payne Brief at 28. Absent evidence that any such use of the price difference actually occurred and had some competitive effect, this suggestion is pure conjecture and does not show any actual injury to competition or even to any competitor. See *Dole Valve Co.* v. *Perfection Bar Equipment, Inc.*, 311 F. Supp. 459, 462 (N.D.Ill. 1970).

minor fluctuations from year to year. Payne Brief at 26. Moreover, the Fifth Circuit explicitly rejected Payne's contention that these fluctuations were caused by Chrysler's incentive programs. 607 F.2d at 1135 n.3, 136 n.5. And finally, Payne's evidence regarding new car net profit margins shows that Payne's margins were the highest of his competitors in 1973 and somewhere in the mid-range in other years. Payne Brief at 16 n.7. This evidence clearly shows no actual substantial adverse impact on competition.

F. Since Price-Discrimination Is Not a *Per Se* Violation, Actual Competitive Injury May Not Be Presumed.

Although Payne repeatedly refers to an "inference" of competitive injury from mere evidence of a price difference, Payne really asks this Court to create a *presumption* of actual competitive injury.* Such a presumption would transform price discrimination into a *per se* antitrust violation in which

---

* The types of evidence which Payne offers to serve as premises for an "inference" of injury to competition are "substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price." Payne Brief at 9. (Cessna is unable to locate even a purported showing of the last factor in Payne's brief.) Mere statements that such factors exist are hardly sufficient to show that the alleged price discrimination had any actual anticompetitive effect. As this Court cautioned in *FTC* v. *Sun Oil Company*, 371 U.S. 505, 527 n.15 (1963): "Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." Since Payne does not make any such analysis, nothing short of a presumption of competitive harm will allow Payne to prevail. Cf. *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248, 1253 (1969) (the district court treated keen competition only as a basis for "assuming" a competitive injury).

Payne also argues two inconsistent theories of competitive injury. Payne begins by asserting that the price differences must have had a competitive impact because the marketplace was characterized by "keen competition" and "fairly small" profit margins. Payne Brief at 9. Later, however, Payne asserts that retail prices were "slightly higher" than they otherwise would have been because of the price differences. *Id.* at 21. "Higher" than normal prices should not occur in a market of "keen" competition. The fact that Payne attempts to "infer" the same injury from opposing factual premises underscores that Payne is really seeking a presumption of competitive injury.

competitive injury is treated as being inherent in the price difference itself.

Such a transformation would be contrary to the statutory provisions of section 2(a). On its face, the statutory language of section 2(a) clearly indicates a Congressional intent to limit the reach of the statute to those price differences that actually have the proscribed adverse effect on competition.* Indeed, the competitive injury requirement is the key to reconciling section 2(a) "with the broader antitrust policies laid down by Congress." *Automatic Canteen Company of America* v. *FTC*, 346 U.S. 61, 74 (1953). A statutory limitation of this type is completely inconsistent with *per se* treatment. See *Brown Shoe Company* v. *United States*, 370 U.S. 294, 319 (1962) (stating that section 7 of the Clayton Act, which contains a virtually identical competitive injury standard of a probability of a substantial lessening of competition, was not meant to apply to every merger but only those having the requisite, anticompetitive effects); *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 507 F.2d 959, 960 n.2, 961 (8th Cir. 1974).

As this Court recognized in *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958), only those types of antitrust violations which have inherently pernicious anticompetitive effects are appropriate for *per se* treatment in which competitive injury is presumed. This Court recently reaffirmed that *per se* treatment is to be the exception rather than the rule in antitrust analysis. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 50, 58-59 (1977). Unlike those antitrust violations that have been singled out for *per se* treatment, price discrimination carries no inherent pernicious effect on competition. Depending on the market situation and the actual use, if any, to which a favored competitor puts a discount, price discrimination may or may not have any competitive significance; it may even be procompetitive. *See*

---

* Compare sections 2(c), 2(d), and 2(e) of the Clayton Act, 15 U.S.C. §§ 13(c), (d), (e), which prohibit certain discriminatory practices without regard to lessening competition.

United States Department of Justice, Report on the Robinson-Patman Act (hereinafter "Department of Justice Report") at 47-58 (1976).

In addition, unlike the *per se* violation of price fixing, price discrimination has no necessary relationship to a normal, prevailing market price. With regard to price fixing, it is reasonable to assume that the effect will ultimately be to raise prices to some higher than competitive level. Hence, price fixing can normally be presumed to be an "overcharge" situation. By contrast, a price difference may simply provide a favored purchaser with a *lower* price than other purchasers from the same seller. In that situation there is no "overcharge" comparable to the higher than competitive price resulting from price fixing; there has only been an "undercharge" to the favored buyer. *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 746 (1947); *Edward J. Sweeney & Sons* v. *Texaco, Inc.*, 478F. Supp. 243,274-75 (E.D. Pa. 1979), aff'd, ____ F.2d ____, 1980-1 Trade Cases ¶63,611 at 77,237n.6 (3rd Cir. 1980). Whether such an undercharge has any competitive effect at all depends on such factors as the market structure, the supply/demand situation, and what, if anything, the favored buyer does with the price difference. *Per se* treatment is entirely inappropriate to section 2(a). *See Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953) (the Robinson-Patman Act could "give rise to a price uniformity and rigidity in open conflict with the purposes of the antitrust legislation"); Department of Justice Report, supra, at 8-100, 209-249 (1976) (the Robinson-Patman Act itself has certain anticompetitive effects).

G. Neither *Illinois Brick* Nor *Hanover Shoe* Eliminates the Requirement of Proof of Actual Injury to Competition.

Payne suggests that *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.*, v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), create some broad and pervasive prohibition against requiring proof of the actual anticompetitive use of a discount. Payne Brief at 10, 11, 18, 28, 33, 34, 35, 36, and 39. Neither case supports any such

application. Both of those cases address different issues, arising in different contexts, and resting upon different considerations than the case at bar.

The simple answer to Payne's contention regarding *Hanover Shoe* is that Justice White's opinion, at the end of the section relating to the "passing-on" defense, explicitly recognizes that "establishing damages might require a showing of loss of profits to the buyer" in Robinson-Patman price discrimination cases. 392 U.S. at 494 & n.10 (citing *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), which found inadequate evidence of competitive injury). The reason for this recognition is readily apparent if the nature of the violation in *Hanover Shoe* is considered. *Hanover Shoe* involved a monopolization offense under section 2 of the Sherman Act—a *per se* violation in which competitive injury is presumed. The analysis in *Hanover Shoe,* and the cases cited by the Court, apply to monopolization and price fixing, two *per se* violations in which competitive injury is treated as being inherent. 392 U.S. at 483, 489-90.

This *per se* context carries significant implications for the "intermeshing" of section 4 with the substantive antitrust offense as required by *Brunswick.* In the context of *per se* Sherman Act offenses, there is no open issue regarding whether there was an injury to competition. Thus, the issue in *Hanover Shoe* was not *whether* there was a competitive injury, but rather *who* could prosecute a claim upon it under section 4, the direct purchaser or a subsequent customer who received a "passed-on" overcharge. By contrast, since no competive injury may be presumed in a section 2(a) price discrimination action, competitive injury remains a substantive element of liability which plaintiff must prove.

Moreover, in light of the *per se* nature of the offense in *Hanover Shoe,* the Court refused to allow the "passing-on" defense because of the threat that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who

would bring suit against them." *Id.* at 494. These considerations are inapplicable to secondary-line price discrimination claims. To begin with, a defendant seller such as Chrysler (or Cessna) does not receive the "fruits" of the alleged violation—the allegedly favored purchaser does. Second, secondary-line price discrimination cases do not create any threat of the absence of a viable plaintiff as discussed in *Hanover Shoe.*

In *Illinois Brick*, this Court reaffirmed its holding in *Hanover Shoe.* To prevent the possibility of multiple liability, the Court held that indirect purchasers are not permitted to seek treble damages under section 4. 431 U.S. at 730-31. In addition, the Court found that private enforcement of the antitrust laws is better served by treating the direct purchaser as if it were injured to the full extent of the antitrust injury. *Id.* at 745-747. Because *Illinois Brick* follows the *Hanover Shoe* analysis, it is inapplicable to the issue of competitive injury in section 2(a) cases for the same reasons set out above. The multiple recovery problem discussed in *Illinois Brick* has no application to proof of antitrust injury in secondary-line price discrimination cases.*

Finally, it should be noted that the discussion in both cases regarding the difficulty of tracing damages through various levels of distribution in suits by indirect purchasers is inapplicable to proof of the use of a discount by a favored customer required for section 2(a) liability. A section 2(a) plaintiff does not have to trace price changes *through* different distributive levels; he only has to show that the favored competitor lowered prices because of the price advantage and that, as a result, the plaintiff lost sales or profits. Similar proof has been found to be entirely workable in a variety of different types of commercial litigation.**

---

* As in price-fixing cases, the proper plaintiff in a secondary-line price discrimination action under section 2(a) is the disfavored *direct* purchaser.

** Similar proof of resulting lost sales or lost profits is utilized in predatory pricing and refusal to deal cases under the Sherman Act. *E.g., Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 376-378 (1927).

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT "THE AMOUNT OF THE PRICE DISCRIMINATION" MAY NOT BE TAKEN AS THE AMOUNT OF DAMAGES.

Payne's contention that "the amount of the price discrimination" can be used as a surrogate for the actual amount of damages is inseparably dependent upon Payne's contention that the requisite competitive injury can be presumed from the mere fact of a price difference.* Once it is recognized that a price difference creates no automatic injury to competition, it is axiomatic that a price difference does not create any automatic amount of injury. Hence, all of the arguments against presuming the requisite injury to competition apply with equal force against presuming the amount of injury. The latter presumption cannot exist in the absence of the former.** The Fifth Circuit was eminently correct when it

---

* In *Fowler Manufacturing Company* v. *Gorlick*, 415 F.2d 1248 (1969), a case relied upon heavily by Payne, the conclusion that "automatic damages" are appropriate rests on the premise that there need not even be an "assumption" that competitive injury occurred. *Id.* at 1253. Thus, *Fowler* clearly treats section 2(a) as though price discrimination were intended to be a *per se* offense with a threshold for damage liability as low or even lower than that for Sherman Act offenses. *Id.* at 1251, 1252 & n.2.

** Payne and *amici* Vanco and Hasbrouck all contend that this Court approved automatic damages in the amount of the difference in prices by the language appearing in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 757 (1947). It is somewhat surprising to find Payne elevating what has been regarded as dicta for 33 years into a holding of the Court. That position is untenable. The only issue decided by the Court in *Bruce's Juices* was whether a purchaser can refuse to pay for goods received simply because he alleges that the price charged by the buyer was discriminatory relative to some other sale. See Learned Hand's discussion of the limited significance of the same language in *Bruce's Juices* relied upon by Payne in *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457, 459-460 (2nd Cir), cert. denied, 353 U.S. 965 (1957).

Moreover, the record in *Bruce's Juices* was "unsatisfactory" by the Court's own characterization. 330 U.S. at 746. As a result of "the uncertain nature of the proceedings below," the majority was forced to

(Continued on Following Page)

concluded that "There is no necessary correlation [between a calculation of the amount of price discrimination and the amount of injury to the business of a disfavored buyer]."* 607 F.2d at 1137. The Department of Justice has also concluded that a resort to "automatic damages" under section 2(a) is inappropriate. *See* Department of Justice Report, *supra,* at 34-35, 44-45 (1976).

A prime example of the lack of correlation between the amount of a price difference and any damages actually incurred is found in *Sano Petroleum Corp.* v. *American Oil Co.,* 187 F.Supp. 345 (E.D.N.Y. 1960). In that case, the plaintiff argued that the proper measure of damages was "the difference in price to it and another buyer multiplied by the number of [units] *bought by* [plaintiff]." *Id.* at 357. The plaintiff had purchased 5,200,379 gallons of gasoline at a one-half cent per gallon higher price than its competitor paid for 239,440 gallons. As a result, the plaintiff claimed damages of

---

(Continued from Preceding Page)

"assume, but ... not decide" that Bruce's Juices could make out a section 2(a) claim. *Id.* at 747. The recitation of this assumption follows the Court's observation that "Bruce is not complaining of the high price of cans. Bruce complains of a lower price for cans to others—which would enable competitors to put their products on the market cheaper." *Id.* at 746. Thus, it is clear that the Court was not considering "the amount of the overcharge" in the sense that Payne and its amici use the term. See Payne Brief at 29.

Rather, one can only read the *Bruce's Juices* language relied upon by Payne as resting on an *assumption* that Bruce would somehow successfully prove a competitive injury resulting in actual damages amounting to the same amount as the price difference. Such a hypothetical setting cannot be said to have created a principle of law on an issue not before the Court. In fact, the $60,000 judgment subsequently awarded Bruce by the trial court does not appear to have resulted from a computation of the "amount of the discrimination." See *Bruce's Juices* v. *American Can Co.,* 87 F. Supp. 985, 993-94 (S.D. Fla. 1949). Cessna respectfully submits that the Court should take this occasion to clarify that reliance on *Bruce's Juices* as authority for the creation of an automatic damage rule is misplaced.

* *Amicus* Vanco Beverage, Inc. concedes there is no particular correlation between the discount given to competitiors and the amount of damages a disfavored customer suffers. *See* Vanco Brief at 16-18.

$26,002 although the favored purchaser had only been advantaged by a total of $1,297. *Id.* at 357. Clearly, when there is an imbalance in the number of favored and disfavored purchases, the automatic damage approach leads to damage claims that have no connection at all with reality.

Similarly, the class action litigation presently faced by Cessna dramatically demonstrates the absence of any relationship between the alleged "amount of discrimination" and any conceivably plausible estimate of the amount of any actual damages in a multiple purchaser setting.* In the Cessna litigation, plaintiff presently claims that there were approximately 3,100 "favored" aircraft sales to distributors and approximately 20,000 "disfavored" sales to class members. Claiming that the "amount of discrimination" equals the difference between the prices class members actually paid for aircraft and the hypothetical amount the class members would have paid if they had received a wholesaler's discount, plaintiff estimates that the aggregate sum of the "amount of discrimination" for the entire class is approximately $37 million—$111 million after trebling. The "amount of discrimination" claimed by plaintiff has no relationship to any conceivable damages actually suffered by the class. It is a classic example of a misplaced "overcharge" analysis run wild.**

---

* A number of lawsuits raising section 2(a) claims have been found to be unsuited to class treatment because of the inherently individual nature of proof of injury and damages, among other factors. E.g., *Kelley* v. *General Motors Corp.*, 425 F. Supp. 13 (E.D. Pa. 1976); *Chmieleski* v. *City Products Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976); *Boro Hall* v. *Metropolitan Tobacco Co.*, 74 F.R.D. 142 (E.D. N.Y. 1977); *Shaw* v. *Mobil Oil Corp.*, 60 F.R.D. 566 (D.N.H. 1973); *Hettinger* v. *Glass Specialty Co.*, 59 F.R.D. 286 (N.D. Ill. 1973); *Bel Air Markets* v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972); *Van-S Aviation Corp* v. *Louisiana Aircraft, Inc.*, 1976-1 Trade Cases ¶ 60,759 (S.D. Fla., 1974).

** Relatively few Robinson-Patman damage cases have been litigated to a judgment for damages. Of those that have, the handful which have adopted the so-called "automatic damages rule" have done so in relatively simple market situations involving small dollar amounts. *E.g., Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248, 1250, 1252 (9th Cir. 1969) (a section 2(a) case in which there were 4

The *only* way to avoid the difficulties and injustices inherent in the concept of "automatic damages" is to follow the path prescribed by Congress and require proof of the best reasonable estimate of the actual amount of lost net profits suffered by the individual claimant.* Had Congress intended to provide for automatic damages for price discrimination, it would have done so.**

(Continued from Preceding Page)

competitor-purchasers and single damages amounted to $8,540.60). *See also, Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988, 990 (8th Cir. 1945) (an action under sections 2(d) and 2(e) in which single damages amounted to $1,010); *Grace* v. *E. J. Kozin Co.*, 538 F.2d 170, 172 (7th Cir. 1976) (a section 2(c) case in which single damages were $19,780.64 on the section 2(c) count).

* The situation of amicus Ricky Hasbrouck does not demonstrate any difficulty of proving actual antitrust injury. The District Court has not reached the issue of whether there was a failure of proof of injury. Rather, the District Court only ruled that it had given a clearly erroneous jury instruction when it stated that injury could be inferred from nothing more than the price difference. Cessna submits the District Judge's correction of his previous error in the instructions was eminently correct. See *Hasbrouck* v. *Texaco, Inc.*, 1980-2 Trade Cases (CCH) ¶63,343 (E.D. Wash. 1980).

** For example, see 49 U.S.C. §2 (repealed 1978) which provided for automatic damages. If Congress had intended to provide for direct damages it would have written similar damage provisions into the Robinson-Patman Act.

CONCLUSION

For the reasons set forth above, Cessna respectfully submits that the decision of the Fifth Circuit should be upheld with regard to the necessity of proof of an actual substantial lessening of competition and of the actual amount of antitrust damages, if any, suffered by the plaintiff as a result thereof.

Respectfully submitted,

THOMAS E. DEACY, JR.

Of Counsel:
DALE L. BECKERMAN
DEACY & DEACY
1000 Bryant Building
Kansas City, Missouri 64106

THOMAS Y. DAVIES
KIRKLAND & ELLIS
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601

BOWLES & BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

THOMAS E. DEACY, JR.
1000 Bryant Building
Kansas City, Missouri 64106
(816)421-4000
and

E. HOUSTON HARSHA
200 East Randolph Drive
Room 5800
Chicago, Illinois 60601
and

ALAN I. BECKER
135 S. LaSalle Street
Chicago, Illinois 60603

STATE OF ILLINOIS
COUNTY OF COOK } ss.

AFFIDAVIT OF SERVICE

Thomas Y. Davies, being first duly sworn, deposes and says:

1. That this affidavit is made pursuant to Rule 28.5(c) of the Supreme Court Rules;

2. That affiant is an attorney representing The Cessna Aircraft Corporation; and

3. That, in compliance with Rules 28.3 and 36.5 of the Supreme Court Rules, affiant caused three copies each of the attached MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION, to be served upon all parties required to be served: namely, Morris K. Sirote at Sirote, Permutt, Friend, Friedman, Held & Apolinski, P.A., 222 Arlington Avenue South, Birmingham, Alabama 35205, counsel for petitioner, J. Truett Payne, Inc.; J. Frederic Ingram at Thomas, Taliaferro, Forman, Burr & Murray, 1600 Bank for Savings Building, Birmingham, Alabama, 35203, counsel for respondent, Chrysler Motors Corporation; John T. Cusack, One First National Plaza, Suite 3300, Chicago, Illinois 60603, counsel for *amicus curiae* Vanco Beverage, Inc.; and Robert H. Whaley at Winston & Cashatt, Fifth Floor, Spokane & Eastern Building, Spokane, Washington 99201, counsel for *amicus curiae* Ricky Hasbrouck, et al., by causing said copies to be deposited in the United States mail, with first-class postage prepaid on December 29, 1980.

Further affiant says not.

_____
Thomas Y. Davies

Sworn to before me this
29 day of December, 1980.

_____

My commission expires

No. 79-1944

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

J. TRUETT PAYNE, INC., a Corporation
Petitioner,
vs.
CHRYLSER MOTORS CORPORATION, a Corporation
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF OF HASBROUCK, ET AL. AS AMICUS CURIAE URGING REVERSAL

ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, Washington 99201
(509) 838-6131

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
14th Floor, Hoge Building
Seattle, Washington 98104
Counsel for Amicus Curiae

No. 79-1944

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

J. TRUETT PAYNE, INC., a Corporation
Petitioner,
vs.
CHRYLSER MOTORS CORPORATION, a Corporation
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF OF HASBROUCK, ET AL. AS AMICUS CURIAE URGING REVERSAL

ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, Washington 99201
(509) 838-6131

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
14th Floor, Hoge Building
Seattle, Washington 98104
Counsel for Amicus Curiae

INDEX

Page

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE 1

BRIEF AMICUS CURIAE OF HASBROUCK, ET AL 1

QUESTIONS PRESENTED 2

INTEREST OF AMICUS CURIAE 2

STATEMENT OF FACTS 4

ARGUMENT 8

I. *PAYNE V. CHRYSLER* ADOPTS AN IMPRACTICAL AND INSURMOUNTABLE BURDEN OF PROOF 8

A. Proof of Lost Sales Are An Impractical And Insurmountable Burden of Proof 10

B. Proof of Profits Lost From Lowered Prices Presents An Impractical And Insurmountable Burden of Proof 12

II. *BRUNSWICK CORP. V. PUEBLO BOWL-O-MAT, INC.*, 429 U.S. 477 (1977), DOES NOT OVERRULE OR AFFECT THE COURT'S PREVIOUS STATEMENT OF DAMAGES IN BRUCE'S JUICES 14

III. AN AWARD OF DAMAGES BASED UPON THE AMOUNT OF THE DISCRIMINATION IS CAUSALLY RELATED TO THE PROOF OF ACTUAL INJURY 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Bruce's Juices, Inc. v. American Can Co.,
330 U.S. 743 (1947) ..... II, 3, 7, 14, 15, 17

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) ..... II, 8, 14

Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133
(5th Cir. 1979), *cert. granted* 49 L.W. 3207
(Oct. 7, 1980) ..... II, III, 2, 3, 8, 10, 11, 12, 14, 15

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988
(8th Cir.), *cert. denied* 326 U.S. 773 (1945) 9

Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457
(2nd Cir.) *cert. denied* 353 U.S. 965 (1957) 9, 10, 12, 14

Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969),
cert. denied 396 U.S. 1012 (1970) ..... II, 3, 7, 8, 9, 14

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 11

Hanover Shoe, Inc. v. United Shoe Machinery,
392 U.S. 481 (1968) 11, 13, 17

Hasbrouck, et al. v. Texaco, 1980-2
Trade Cases para. 63,343
(E.D. Wn. 1980) ..... I, II, III, 2, 3, 4, 7, 8, 10, 12, 15, 17

Interstate Commerce Commission v. Campbell,
289 U.S. 385 (1933) 9

Story Parchment Paper Co. v. Patterson,
282 U.S. 555 (1931) 17

STATUTES

Pages

15 U.S.C. §13 (Robinson-Patman Act) I

No. 79-1944

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

J. TRUETT PAYNE, INC., a Corporation
Petitioner,
vs.
CHRYSLER MOTORS CORPORATION, a Corporation
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF HASBROUCK, ET AL. URGING REVERSAL[1]

ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, Washington 99201

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
14th Floor, Hoge Building
Seattle, Washington 98104
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

This motion for leave to file a brief *amicus curiae* is presented on behalf of Ricky Hasbrouck and eleven other Texaco brand service station dealers who are appellants in the Ninth Circuit appeal of *Hasbrouck, et al. vs. Texaco,* 1980-2 Trade Cases para. 63,343 (E.D. Wn. 1980) (9th Cir. filed April 29, 1980), hereinafter referred to as Hasbrouck, et al. The above individuals hereby respectfully move for leave to file a brief *amicus curiae* in this case in support of petitioner, J. Truett Payne, Inc., as provided in Rule 36 of the Rules of this Court. The consent of the counsel for the petitioner was obtained. Counsel for respondent, Chrysler, has declined to consent. The basis for this motion is the following:

1. Hasbrouck, et al., are or were individual Texaco brand service station dealers in Spokane, Washington. The issues involved in *Hasbrouck, et al. v. Texaco* are identical to the issues involved in this case. Hasbrouck, et al., alleged that Texaco unlawfully discriminated in price against them in violation of the Robinson-Patman Act, 15 U.S.C. §13 because for seven and one-half years, Texaco sold identical gasoline at substantially lower prices to two favored customers who operated competing retail gasoline stations in the Spokane, Washington, market. Following a four-week trial, the jury found Texaco had violated the Robinson-Patman Act and awarded separate verdicts for each plaintiff totaling $849,484.00 before trebling. On the motion of Texaco, the District Court

entered judgment for Texaco notwithstanding the verdict and the appellants have appealed that decision to the Ninth Circuit. The appellants' brief was filed in the Ninth Circuit on October 16, 1980. Texaco has requested an extension of time to file their brief until January 23, 1981. The basis for the Court granting the judgment notwithstanding the verdict was its conclusion that it had erroneously instructed the jury based upon *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The *Fowler* court held and the trial court instructed that the amount of the price discrimination can constitute a business injury under the antitrust laws entitling the plaintiff to recover the amount of the discrimination.

The District Court relied upon *Chrysler Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted* 49 L.W. 3207, Oct. 7, 1980, for the proposition that this Court through its decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), has rejected and impliedly overruled *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), *Fowler v. Gorlic, supra,* and other decisions allowing private litigants to recover the amount of the discrimination as damages.

2. The respondent Chrysler, in its Brief in Opposition to the Petition for a Writ of Certiorari cited *Hasbrouck, et al., supra,* for the proposition that *Fowler v. Gorlick, supra,* was no longer the law in the Ninth Circuit. Chrysler made this argument in support of its contention that there is no longer a conflict within the circuits on the issue of the proper measure of damages in a Robinson-Patman Act case. The Hasbrouck plaintiffs have an interest in responding to the position taken by Chrysler and refuting the argument that *Fowler v. Gorlick, supra,* and its source *Bruce's Juices v. American Can Co., supra,* are not the law in the Ninth

Circuit or the United States.

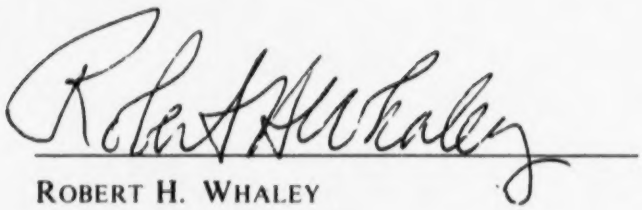
3. The grant of certiorari by the Court in this case emphasizes the fact that it raises questions of national significance concerning the availablility of a private remedy under the Robinson-Patman Act once a violation of the Act has been established. As appellants in the Ninth Circuit under similar circumstances, the Hasbrouck plaintiffs will be directly and seriously affected by the decision of this Court. The petitioner will necessarily concentrate on the particular facts of his own case. In the Brief tendered with this Motion, Hasbrouck, et al., will concentrate on showing that the rule of *Payne v. Chrysler,* imposes an impractical and unrealistic measure of damages in a private antitrust case which is insurmountable in most industries. Hasbrouck, et al., will demonstrate that the amount of the discrimination constitutes a direct business injury which is a proper measure of damages under the Robinson-Patman Act. Finally, *Hasbrouck, et al.,* will illustrate to the Court the drastic effects which will result to private enforcement of the Robinson-Patman Act, should the Fifth Circuit decision be upheld.

4. The important issues presented by *Payne v. Chrysler* should be considered in light of their affects on other industries such as the retail gasoline industry where price discrimination has alarming and disastrous consequences. The record in *Hasbrouck* graphically illustrates the consequences of these issues.

5. For the foregoing reasons, the motion for leave to file the attached brief as *amicus curiae* should be granted.

DATED this 20 day of November, 1980.

Respectfully submitted,



ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, WA 99201

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
13th Floor, Hoge Building
Seattle, WA 98104
Attorneys for Amicus Curiae

No. 79-1944

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

J. TRUETT PAYNE, INC., a Corporation
Petitioner,
vs.
CHRYSLER MOTORS CORPORATION, a Corporation
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF HASBROUCK, ET AL. URGING REVERSAL[1]

ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, Washington 99201

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
14th Floor, Hoge Building
Seattle, Washington 98104
Counsel for Amicus Curiae

[1]Pursuant to Rule 36, Paragraph 3, Counsel for Petitioner J. Truett Payne has consented to the filing of this Brief. Counsel for Respondent Chrysler has declined to consent.

QUESTIONS PRESENTED

This case presents serious questions which go to the very heart of the private enforcement of the antitrust laws and the standard of proof required under the Robinson-Patman Act. The questions presented necessarily include the following:

1. Whether the amount of the discrimination can properly be made the basis for an award of damages under the Robinson-Patman Act where there is a finding by the jury of a violation of the Robinson-Patman Act.

INTEREST OF AMICUS CURIAE

The appeal of the case of *Hasbrouck, et al., v. Texaco,* 1980-2 Trade Cases para. 63,343, (E.D. Wn. 1980) (9th Cir. filed April 29, 1980) No. 80-3160, will more than likely be decided by this Court's opinion in this case. The procedural position of the Hasbrouck plaintiffs, however, is somewhat different than that of *Payne.* In *Payne,* the Fifth Circuit Court of Appeals never addressed the liability issues raised by Chrysler, because it ruled as a matter of law that the damage proof of *Payne* had been insufficient. The liability issue in *Payne* remains unresolved. In *Hasbrouck, et al.,* the jury's findings of liability under the Robinson-Patman Act was not disturbed by the District Court and the liability issue has not been appealed by Texaco. Thus, the question of Texaco's violation of the Robinson-Patman Act is not an issue. The *Hasbrouck* Court reversed the jury's verdict solely on the issue of damages, ruling as a matter of law that the amount of discrimination wrongfully paid by the plaintiffs could not be used as a measure of damages. The District Court's reversal of the jury's award of damages

relied in substantial part upon the Fifth Circuit's decision in *Payne v. Chrysler, supra.* Another difference also exists in the two cases. In *Hasbrouck, et al.,* the jury was instructed that if the jury found an unlawful price discrimination, the jury could, (but was not required to) consider the unlawful discrimination as constituting business injury. The jury was also instructed that the amount of the discrimination alone could properly be awarded as damages; contrary instructions were given in *Payne.* The jury in *Hasbrouck, et al.,* returned a verdict in an amount less than the total amount of discrimination proven. In *Payne,* the jury returned a verdict in excess of the amount of discrimination proven.

The above procedural and legal differences in the record between the Hasbrouck plaintiffs and *Payne* emphasize the special interest of the Hasbrouck plaintiffs in sustaining the legal principle that the amount of unlawful price discrimination proscribed by the Robinson-Patman Act is a direct business injury and secondly, can properly be awarded as damages by a jury after the violation of the Robinson-Patman Act is shown.

The *Hasbrouck* Court in reversing the jury's verdict, committed the same error as was committed by the Fifth Circuit in *Payne.* It held that in order to recover, even after proof of a violation, the plaintiff must prove the amount of lost sales to the favored customer and cannot recover the amount of discrimination wrongfully paid. The Fifth Circuit's decision was relied upon by the *Hasbrouck* Court in reversing the plaintiff's verdict, and was cited as authority for ignoring the Supreme Court's decision in *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743 (1947) and the Ninth Circuit's decision in *Fowler Mfg. Co. v. Gorlick,* 415 F.2d 1248 (1969), *cert. denied* 396 U.S. 1012 (1970). Chrysler has cited

Hasbrouck in opposition to the Petition for Certiorari as reflecting the present state of the law in the Ninth Circuit. To attempt to correct the impact of *Payne*, the Hasbrouck plaintiffs are seeking leave to file this brief as a friend of the Court.

STATEMENT OF FACTS

The District Court in *Hasbrouck, et al.*, and the Court of Appeals in *Payne* improperly concluded that there was insufficient evidence establishing damage to the plaintiffs. Therefore, an understanding of the facts pertaining to the injury to competition and damage is necessary in this brief.

During the seven and one-half (7½) year period of time for which damages were sought, the plaintiffs in *Hasbrouck, et al.*, were operators of Texaco retail gasoline stations in Spokane, Washington. Each purchased gasoline from Texaco at a price based upon "retail tank wagon." During the same period of time, Texaco granted substantial discounts off the retail tank wagon price to two favored purchasers which operated Texaco branded and unbranded stations in Spokane in competition with the plaintiffs. The amount of the discount granted to the favored purchasers varied from 2.65 cents to 6.0 cents per gallon of gasoline. The favored purchaser stations generally posted retail prices significantly lower than the plaintiffs and many times posted prices which were at or near the purchase price that the plaintiffs had to pay Texaco.

The retail gasoline market in Spokane was characterized by strong competition and low profit margins. Except in the most unusual circumstances, a station's retail gasoline price was the most important factor to its success. According to Texaco's own dealer

training manual, the amount of a station's non-gasoline sales (such as sales of tires, batteries and accessories), depended upon the size of its gasoline sales. Because of Spokane's relatively small geographic size and the pattern of its streets, the city has substantial cross-city traffic and there was effective competition between stations over relatively broad areas. Price changes in one part of Spokane moved and affected other parts of the city.

There was direct evidence of competition between the plaintiffs' stations and the favored stations including the existence of price zones which contained both the plaintiff stations and stations operated by the favored purchasers. Price zones were created by Texaco to include stations in a defined geographic area which directly competed for the same customer because of localized traffic patterns. While it was impossible for the plaintiffs to prove where former or potential customers purchased their gasoline, several plaintiffs identified specific customers which had traded with them and which now appeared to be trading with the favored purchaser.

The plaintiffs responded to competition from the favored favored purchasers in various ways. Some recognized that without the same buying price they could not post a low enough retail price to compete effectively on a price basis, and elected to keep their retail prices high in an effort to earn maximum profits on each gallon sold. Others converted their stations in whole or in part to self service operations and attempted to match the favored purchaser's prices; but in so doing, they lost money because of having to pay a higher purchase price. Others reduced their prices as much as possible, but not so far as to operate at a loss. These dealers found that their lower retail price was not low enough to substantially increase their gallonage. All of the plaintiffs, recog-

nizing they were unable to compete effectively on price, tried other means to compete. They worked extremely long hours, gave extremely good service, and invested in other inducements to attract customers (e.g. truck rental services, ice machines, etc.).

Texaco knew that dealers like the plaintiffs were at a competitive disadvantage with the favored purchasers. This knowledge was highlighted in a Texaco marketing department report which discussed favored purchasers who were retailing gasoline on a self-service basis. Texaco concluded in this report that independent retailers (such as the plaintiffs) who converted to self service but who paid the retail tank wagon price could be competitive with favored purchasers only to a degree, and that disfavored purchasers retailing with a partial self service operation could not be sufficiently competitive to maintain sales in the long term.

The result of this competitive situation was startling. Between 1970 and 1975, the sales volume of one of the favored purchaser's almost tripled whereas during the same period the volume sold to independent Texaco dealers such as the plaintiffs declined approximately 30 percent. This same favored purchaser's volume accounted for only 20.7 percent of the Spokane District retail marketing volume in 1970. Four years later, its share of the same market had grown to almost 50 percent. The share of the directly supplied retailers like the plaintiffs, declined from 76 percent to 42 percent during the same period. The eight stations of this favored purchaser were outselling nineteen stations such as the plaintiffs'. By the end of the seven and one-half year period, 7 of the 13 plaintiff stations were closed.

The evidence included startling admissions from Texaco's own executives acknowledging the devastating impact the favored

purchaser's price advantage had upon the sales of independent retailers such as the plaintiffs. The Texaco vice president in charge of marketing acknowledged that a favored purchaser who operated at retail could charge substantially lower prices than stations such as the plaintiffs' and that this factor had caused a "rapid and alarming" shift in volume away from independent retailers and increasing sales by favored purchasers.

The District Court's opinion in *Hasbrouck, et al.,* required the plaintiffs to measure the amount of the shift in volume of sales away from their stations to the favored purchaser. Even though the loss of sales had been proven in general, the Court would not permit recovery of damages except for the specific sale which could be proved to have been lost. Such a burden of proof was impossible in a market with multiple purchasers, sellers, and substitute products and where no records of each lost sale and purchaser for the seven and one-half year period exist.

The District Court instructed the jury that if the jury found unlawful price discrimination, then the jury could, but was not required to, consider the unlawful discrimination as constituting business injury:

> "With respect to this requirement of proving the fact of damage to the plaintiffs, if you find that Texaco did unlawfully discriminate in price against the plaintiffs without legal justification, you may consider that the discriminatory price may constitute business injury."

This instruction was later found by the District Court to have been given in error although it was based upon the holding of the Ninth Circuit's opinion in *Fowler Mfg. Co. v. Gorlick, supra,* and that opinion's analysis of this Court's opinion in *Bruce's Juices, supra.*

This "fact of damage" instruction was followed by a separate causation instruction which clearly stated that the jury had to find that the price discrimination "has been a proximate cause of substantial injury to the plaintiff's business or property" and further described proximate cause in detail. The Court gave the jury a rigorous causation standard, instructing the jury that the plaintiff's injury must be substantially attributable to the discrimination. The Court also instructed the jury that it could find damages in the amount of the discrimination as permitted by *Fowler* and *Bruce's Juices.* Following these rigorous instructions, the jury returned a verdict for the plaintiffs.

The District Court's reversal of the judgment was based primarily on this Court's opinion in *Brunswick, supra,* a Sherman Act case which never mentioned *Bruce's Juices* or the Robinson-Patman Act, and upon the Fifth Circuit's opinion in *Payne.* The Court's instructions which were found to be erroneous, were based upon the Robinson-Patman Act, *Bruce's Juices,* and *Fowler v. Gorlick.*

ARGUMENT

I. PAYNE V. CHRYSLER ADOPTS AN IMPRACTICAL AND INSURMOUNTABLE BURDEN OF PROOF.

The heart of the Fifth's Circuit's ruling and the District Court's ruling in *Hasbrouck, et al.,* is the requirement that a plaintiff must prove specific lost sales to the favored purchaser or lost profits resulting from the disfavored purchaser selling at a lowered price to meet the favored purchaser's lower price. Both opinions support

this proposition by reference to the case of *Enterprise Industries, Inc. v. The Texas Co.*, 240 F.2d 457 (2nd Cir.), *cert. denied*, 353 U.S. 965 (1957). *Enterprise* stated a burden of proof which, if adopted by this Court, effectively emasculates private enforcement of the Robinson-Patman Act. *Enterprise* citing *ICC v. Campbell*, 289 U.S. 385 (1933) held that only the following damages could be recovered:

> "If by reason of the discrimination, the preferred [purchasers] have been able to divert business that would otherwise have gone to the disfavored [purchasers], damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the [disfavored purchasers] to sell at a lowered . . . price . . . , damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more." 240 F.2d at 460 (quoting from *ICC v. Campbell*, 289 U.S. 385 at 390-91) (Citation Omitted).

ICC v. Campbell, supra, 289 U.S. 385 (1933), involved a case decided and a statute enacted several years before the enactment of the Robinson-Patman Act. The Eighth Circuit, in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), specifically rejected the damage reasoning under the Interstate Commerce Act contained in *Campbell*, finding it inapplicable and inconsistent with the Robinson-Patman Act. 150 F.2d at 996. The Ninth Circuit in *Fowler Mfg. Co. v. Gorlick, supra*, also specifically addressed the *Enterprise* measure of damages and rejected it, stating:

> ". . . it would seem apparent that such a direct-damage right would more effectively serve to curb the discrimination which Congress viewed as being most often exercised against smaller competitors, and whose abolition it sought to accomplish

primarily for that reason, than the more difficult consequential-damage rule of the *Enterprise* case." 415 F.2d at 1251

However, because *Payne* and *Hasbrouck* resurrect the *Enterprise* burden of proof and impose it upon the plaintiff, this Court must determine whether or not such a burden of proof is consistent with its prior opinions involving the Robinson-Patman Act as well as its opinions encouraging private enforcement of the antitrust laws.

A. Proof of Lost Sales Are An Impractical and Insurmountable Burden of Proof

The first element of proof under *Enterprise, Payne* and *Hasbrouck* requires a showing of diverted profits caused by customers going to the favored purchaser as opposed to the disfavored purchaser. This standard is insurmountable in a business such as the gasoline business. For instance, the gasoline market involves numerous suppliers and sellers and customers who carry many different credit cards and are free to select from many sellers and brands. The decision to purchase is greatly influenced by price but price cannot be isolated as the sole factor in a decision to purchase. While the proof in a case such as *Hasbrouck, et al.,* establishes the importance of price, the competitive nature of the industry, and different sales volumes, it would be an insurmountable barrier to determine which of the hundreds of thousands of actual and potential gas customers at any particular time went to which station and for what reason. No records exist from which the lost purchaser or sale can be extracted. While the effect on competition and business is apparent from the proof, it is impossible to isolate and then measure the lost sale as the element of damage.

The Supreme Court has previously recognized the consequence of such a restricted requirement for proof of damages in *Hanover Shoe v. United Shoe Mfg. Corp.*, 392 U.S. 481 (1968), and rejected such an impractical and impossible standard of proof in a Sherman Act case. No purchasers would be able to isolate in any particular purchase of gasoline all of the factors which went into the decision to purchase from one service station dealer as opposed to another. However, it would be obvious that the price of the product in a market would tend to attract business to the lower priced dealer and away from the higher priced dealer. To prove the specific customer and sale loss would require proof of the facts of every purchase and potential purchase made in the market including an analysis of all the factors other than price which may influence such a purchase. The antitrust trial would be interminably long and, in effect, the private party would be unable to present such proof.

The consequences of the *Payne* decision, its predecessors and progeny can be realized by considering the situation involved in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). In that case, Morton Salt Company sold its best brand of table salt at a per case price to large customers which was slightly lower than the price to other customers. The proof showed that the price differential translated into a one-half cent difference in the retail purchase price of a 26-ounce package of Morton Salt, and that salt was a relatively minor item in the purchasing retailer's inventories. Notwithstanding this apparently small effect, the Court found that the statute had been violated. The Court said:

> "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially

more for their goods than their competitors had to pay." 334 U.S. at 46-47.

This Court must consider how a grocer would now successfully sue Morton Salt Company as was done by the Federal Trade Commission if it had to show specific lost sales of purchasers of salt. Obviously, the grocery store patron could not isolate its decision to purchase salt or patronize the store solely on the price of salt in any particular grocery store. Like the gasoline dealer, the grocer could not prove the lost sale resulting from the higher price. And yet, the impact of a ½ cent price difference even on such a small item as salt has been recognized by this Court. The *Payne* decision would in effect prevent the small merchant selling products for which there are substitutes and many other sellers and purchasers from recovering under the Act.

B. Proof of Profits Lost From Lowered Prices Presents An Impractical and Insurmountable Burden of Proof.

The second measure of damage which *Enterprise, Payne* and *Hasbrouck* recognize arises where it can be proven that the disfavored purchaser sells at a lower price in response to a lower price posted by the favored purchaser. These Courts indicated that the purchaser could recover only to the extent of the reduction in his price. The analysis made previously concerning the purchaser of Morton Salt applies with respect to proof of the amount of a reduction resulting from the price discrimination. If the disfavored grocer lowered his price for Morton Salt, he would have great difficulty showing that he lowered his price because of the favored grocer's price on Morton Salt, rather than in response to the price of other brands of salt, lower labor costs, or other factors that are involved in setting retail price. He also may not have lowered his price thereby selling at a competitive disadvantage. This Court's opinion in

Hanover Shoe, supra, specifically recognizes the impact of such a burden of proof on the trial of antitrust cases as well as on private enforcement of the antitrust statutes. Requiring a showing of a specific reduction in price is another way of stating that the passing on defense is still viable. In *Hanover Shoe,* the Court stated:

> "We are not impressed with the argument that sound laws of economics require recognizing this [the passing on] defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.
>
> "In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. 492-494.

The insurmountable obstacle created by *Payne* in adopting the passing-on defense of *Enterprise, supra,* and the consequent disastrous effect on private enforcement of the antitrust laws are ample reason to reject the requirement of proof of lost sales and profits under the Robinson-Patman Act and the adopting of the damage rule permitted by *Bruce's Juices* and *Fowler v. Gorlick.*

II. BRUNSWICK CORP V. PUEBLO BOWL-O-MAT, INC., 429 U.S. 477 (1977), DOES NOT OVERRULE OR AFFECT THE COURT'S PREVIOUS STATEMENT OF DAMAGES IN BRUCE'S JUICES.

The Fifth Circuit and the District Court have cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* as in some manner holding that "antitrust injury" is different than injury resulting from proof of price discrimination, stating that the plaintiffs in *Payne* and in *Hasbrouck, et al.,* have not proven "antitrust injury." *Brunswick* was a merger case under the Sherman Act in which the Court stated that the injury must flow from the violation and the injury must be an "antitrust injury." 429 U.S. at 489. Therein, the plaintiff complained that the defendant had rescued a financially insecure competitor of the plaintiff, thereby reducing the profits of the plaintiff because of continued competition from the failing competitor. It was logically pointed out by the Court that a *decrease* in competition was not the type of damage contemplated by the Sherman Act and therefore was not "antitrust injury." 429 U.S. at 489. These words do not add anything to the requirements of proof under the Robinson-Patman Act. Certainly, the Court had antitrust injury in mind in *Bruce's Juices* when it found that the amount of discrimination was a proper measure of damages under the Robinson-Patman "antitrust" statute. The fact that the word antitrust is used to describe injury does not mean that the Supreme

Court in *Bruce's Juices* did not consider the measure of damages therein to be injury under the antitrust laws. From a reading of *Bruce's Juices*, it is obvious that the Court was of the opinion that the amount of discrimination was a damage necessarily flowing directly and proximately from the wrongful price discrimination.

III. AN AWARD OF DAMAGES BASED UPON THE AMOUNT OF THE DISCRIMINATION IS CAUSALLY RELATED TO THE PROOF OF ACTUAL INJURY.

The Fifth Circuit has characterized *Payne's* reliance upon *Bruce's Juices* as one of the "automatic" damages unrelated to proof of actual injury. That is not the case. *Payne*, as did *Hasbrouck, et al.*, provided substantial evidence of injury in fact but was not able to measure that injury by specific lost sales or profits. Proof of the fact of damage was done in numerous ways. In both *Hasbrouck, et al.*, and *Payne*, the plaintiffs proved that because they were required to charge their customers a higher price for the same products sold by the favored purchaser, of necessity they would lose sales to the favored customer who was charging a lower price. In both cases, it is an elementary economic principle and was proved at the trial that a person charging a lower price for the same product will attract sales from the person who is required to charge a higher price. In *Hasbrouck*, the proof of intense competition in the gasoline industry in Spokane, the proof of substantially lower pump prices posted by the favored purchasers, and the dramatic increase in sales made by the favored purchasers in comparison to the disfavored plaintiffs, established that the plaintiffs of necessity would lose customers and sales to the favored purchaser. The problem which arises is in measuring the exact amount of those lost

sales. The only realistic and practical measure of damage was the price discrimination.

Recovery of the amount of discrimination is a conservative, minimum measure of actual damage, for it does not compensate many kinds of damage which flow from a price discrimination. For example, it gives no recovery at all when a plaintiff loses an actual sale; it applies only to those sales which the plaintiff, while subject to the discrimination, was in fact able to sell. It does not compensate for lost related sales in their business such as mechanical services, automobile repair, etc. or for increased costs in competing through means other than price. Such uncompensated losses are significant. For instance, when a plaintiff loses a sale, he loses not only the amount of the price discrimination but his entire profit margin. Recovery of the amount of discrimination hardly authorizes a windfall recovery. Each payment of an illegally high price reduces the amount of capital in the plaintiff's business by that amount. This reduction in capital is of necessity a direct business injury. The amount of the discrimination is an actual loss directly and solely caused by the fact of discrimination.

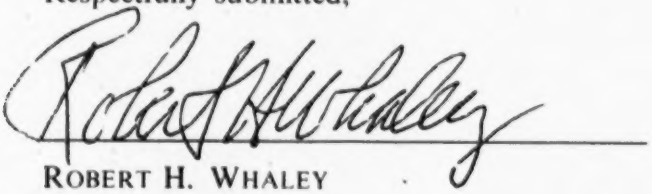
CONCLUSION

Adoption of a measure of damages which permits recovery of the price discrimination is logically sound and fosters compliance with the Robinson-Patman Act. Once the illegality of the price and injury to competition and business have been proven, there is no reason in logic or in policy to permit the defendant to retain the charge wrongfully exacted from the disfavored purchaser. To allow the violator to keep the benefits of an illegal price contravenes the fundamental principle that a wrongdoer may not escape liability

simply because his violation has made its proof more difficult. *Story Parchment Paper Co. v. Patterson*, 282 U.S. 555 (1931). The Fifth Circuit and the District Court in *Hasbrouck, et al.*, have departed from this Court's direction in *Bruce's Juices, supra*, and holding in *Hanover Shoe, supra*. Unless this Court reverses the judgment of the Fifth Circuit Court of Appeals and reaffirms its position in *Bruce's Juices, Hanover Shoe*, and the cases which have followed them, it will have effectively relegated the Robinson-Patman Act to a meaningless proscription which cannot be redressed by injured parties.

DATED this 20th day of November, 1980.

Respectfully submitted,



ROBERT H. WHALEY
LUCINDA S. EYMANN
WINSTON & CASHATT
Fifth Floor
Spokane & Eastern Building
Spokane, WA 99201

JOHN S. EBEL
CULP, DWYER, GUTERSON & GRADER
13th Floor, Hoge Building
Seattle, WA 98104
Attorneys for Amicus Curiae

MOTION FILED
NOV 20 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC.

AND

BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE

JOHN T. CUSACK
One First National Plaza
Suite 3300
Chicago, Illinois 60603
(312) 726-2452
Counsel for Vanco Beverage, Inc.

Of Counsel:
GORDON B. NASH, JR.
EDWARD B. HIRSHFELD
PRISCILLA A. WALTER
GARDNER, CARTON & DOUGLAS
One First National Plaza
Chicago, Illinois 60603

La Salle Street Press — Chicago
Printed in U.S.A.

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Motion by Vanco Beverage, Inc. for Leave to File Brief as Amicus Curiae in Support of Petitioner J. Truett Payne, Inc. vi

I. Respondent Has Refused to Consent vii

II. Interest of Vanco Beverage, Inc. vii

III. Questions of Law that Have Not Been Adequately Presented and Their Relevancy to the Disposition of this Case viii

Brief of Vanco Beverage, Inc. as Amicus Curiae 1

Statement of Interest and Questions Presented 1

Summary of Argument 2

Argument 3

I. Historical Review of Approaches to Proof of Fact of Injury and Reasonable Estimation of Damages in Secondary Line Robinson-Patman Act Cases 3

II. Damage Award in the Amount of the Overcharge is Permissible When the Fact of Injury Has Been Established 12

Reasonable Estimate 12

Overcharge as a Reasonable Estimate 13

Principles Cited to the Contrary Are Unpersuasive 20

III. It is Permissible to Infer the Injury from Other Factors 23

An Inference is Permissible 24

Circumstantial Evidence 26

Contrary Arguments Are Unpersuasive ... 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

PAGE

American Can Co. v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951) 9, 10, 19, 23, 27

American Oil Company v. *Federal Trade Commission*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) 4

Bargain Car Wash, Inc. v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972) 4, 26

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) 12

Bruce's Juices, Inc. v. *American Can Co.*, 330 U.S. 743 (1946) 9, 10, 13, 18, 22, 24, 28

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 29

Chrysler Credit Corporation v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979) 2, 12

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U.S. 726 (1945) 9

E. Edelman & Company v. *Federal Trade Commission*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941, *reh. denied*, 356 U.S. 905 (1958) 26

Edward J. Sweeney & Sons, Inc. v. *Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979) 29

Elizabeth Arden Sales Corp v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) 9, 13, 22

Enterprise Industries, Inc. v. *Texas Company*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) 3, 5, 6, 10, 11, 19, 22, 23, 27, 28, 29

PAGE

Enterprise Industries, Inc. v. *Texas Company,* 136 F.Supp. 420, (D.Conn., 1955), *rev'd,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) 10

Federal Trade Commission v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746 (1945) 10

Federal Trade Commission v. *Morton Salt Co.,* 334 U.S. 37 (1948) 4, 5, 6, 11, 15, 26

Federal Trade Commission v. *Standard Brands, Inc.,* 189 F.2d 510 (2d Cir. 1951) 5, 6

Foremost Dairies, Inc. v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965) 4, 11, 26

Fowler Manufacturing Co. v. *Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970) 9, 13, 29

Grace v. *E. J. Kozin Company,* 538 F.2d 170 (7th Cir. 1976) 9, 13

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968) 14, 15, 18, 19, 20, 21, 27, 28

Illinois Brick Co. v. *Illinois,* 431 U.S. 720 (1977) ..15, 18, 28

International Film Center, Inc. v. *Graflex, Inc.,* 427 F.2d 334 (3d Cir. 1970) 5

Interstate Commerce Commission v. *United States ex rel Campbell,* 289 U.S. 385 (1933) 21, 22

Janich Bros., Inc. v. *American Distilling Co.,* 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978) 25

Moog Industries, Inc. v. *Federal Trade Commission,* 238 F.2d 43 (8th Cir. 1956), *aff'd,* 355 U.S. 411, *reh, denied,* 356 U.S. 905 (1958) 4, 5

National Dairy Products Corp. v. *Federal Trade Commission,* 395 F.2d 517 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968) 5

PAGE

Perkins v. *Standard Oil Co. of California*, 395 U.S. 642 (1969) 8, 29

Samuel H. Moss, Inc. v. *Federal Trade Commission*, 148 F.2d 378, (2nd Cir.), *cert. denied*, 326 U.S. 734 *reh. denied*, 326 U.S. 809 (1945) 5, 6

Sano Petroleum Corporation v. *American Oil Company*, 187 F.Supp. 345 (E.D.N.Y. 1960) 5

Standard Motor Products, Inc. v. *Federal Trade Commission*, 265 F.2d 674 (2d Cir.), *cert. denied* 361 U.S. 826 (1959) 4, 6, 26

State Wholesale Grocers v. *Great Atlantic & Pacific Tea Co.*, 202 F.Supp. 768 (N.D. Ill. 1961) 13, 20

Story Parchment Company v. *Paterson Parchment Paper Company*, 282 U.S. 555 (1931) 12

Vanco Beverage, Inc. v. *Falls City Industries Inc.*, 1980-2 CCH Trade Cases ¶ 63,357 (S.D. Ind. 1980) ..... vii, 15

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 12

Statutes

15 United States Code, Section 13(a) ..... *passim*

15 United States Code, Sections 13(d) and 13(e) 9, 13

15 United States Code, Section 13(c) 13

15 United States Code, Section 15 (Section 4 of the Clayton Antitrust Act) 13, 23, 24, 28

Treatises and Articles

American Bar Association Section of Antitrust Law, Monograph 4, Vol. 1, The Robinson-Patman Act; Policy and Law (1980) 26

PAGE

Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harvard Law Review 697 (1975) 25

Handler, Changing Trends in Antitrust Doctrine, An Unprecedented Supreme Court Term—1977, 1977 Columbia Law Review 979 (1977) 28

M. Handler, Twenty-Five Years of Antitrust, v. 2 (1973) 17, 24, 28

16C Von Kalinowski, Business Organizations, Antitrust and Trade Regulation § 31.01[2] 4

16C Von Kalinowski, Business Organizations, Antitrust and Trade Regulations §31.01[2][c] 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC.

Vanco Beverage, Inc. ("Vanco") respectfully moves this Court for leave to file BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE, instanter. The grounds for Vanco's motion are stated below pursuant to Rule 36.3 of the Rules of the Supreme Court.

I. Respondent Has Refused to Consent

Pursuant to Rule 36.1 of the Rules of the Supreme Court, Vanco requested petitioner J. Truett Payne, Inc. ("Truett Payne") and respondent Chrysler Motors Corporation ("Chrysler") to consent to filing of an amicus curiae brief by Vanco in support of petitioner Truett Payne. Truett Payne consented. Chrysler refused to consent.

II. Interest of Vanco Beverage, Inc.

Vanco is interested in this case because it is the plaintiff in litigation which involves certain legal issues similar to those involved here. Vanco is an Indiana corporation engaged in beer distribution. Vanco and its competitors purchase beer from brewers and resell that beer to retailers. Vanco's complaint is based on secondary line price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Vanco won a judgment after a bench trial before the Hon. Cale J. Holder, reported as *Vanco Beverage, Inc.* v. *Falls City Industries, Inc.*, 1980-2 CCH Trade Cases ¶ 63,357 (S.D. Ind. 1980). That judgment has been appealed to the United States Court of Appeals for the Seventh Circuit, docket no. 80-1709. The appeal has been fully briefed and has been set for oral argument on December 10, 1980.

The District Court, after finding that Vanco had lost profits and lost business as a result of illegal price discrimination, that it had absorbed much of the illegal overcharge and that the defendant's discriminatory prices were not set to meet competition, awarded Vanco damages in the amount of the overcharges, trebled. *Vanco Beverage, Inc.* v. *Falls City Industries, Inc., supra,* at page 75,821. On appeal, the defendant has argued that the overcharge may not be awarded to Vanco and that the damage award may only be measured by the amount of sales and profits that Vanco can

specifically demonstrate it lost as a result of the price discrimination found by the District Court.

The primary disputes in the case at bar are: 1) whether petitioner Truett Payne adequately proved that it was injured by illegal price discrimination, and 2) whether the overcharge is a proper measure of damages. Vanco is concerned with reaffirming that after price discrimination, probable injury to competition and fact of injury to the plaintiff have been demonstrated, the amount of the price discrimination may be a proper measure of damages in a secondary line Robinson-Patman Act case. This Court's decision in the instant case may reach that issue and thus affect Vanco's case on appeal. In addition, Vanco did not rely on an inference from the price discrimination to prove fact of injury, but established the injury by introducing substantial evidence in addition to the overcharge. Vanco supports petitioner Truett Payne's position that injury may be inferred from price discrimination between competitors or, in the alternative, from other circumstantial evidence, and that proof of specific lost sales and profits is not necessary to establish the fact of injury.

III. Questions of Law That Have Not Been Adequately Presented and Their Relevancy to the Disposition of This Case.

The Fifth Circuit's opinion in the case presently being reviewed states that both the fact of injury and the amount of damage must be established by substantial evidence of actual lost sales and profits. With regard to proof of fact of injury, the present case poses questions of whether sufficient evidence was presented to allow the case to go to the jury, including whether the jury could infer such injury from proof of the price discrimination. The Fifth Circuit

cast this issue in terms of an "automatic damages" concept. As is evident from Vanco's situation, however, it is not sufficient for this Court to decide simply whether or not injury may be inferred from a demonstrated price discrimination. Vanco established injury to itself from other kinds of evidence, including: (1) declines in its sales volume and profitability relative to its favored competitors and relative to similar businesses unaffected by the price discrimination; (2) advertisements by customers of the favored competitors soliciting business in Vanco's natural market area; and (3) surveys and direct evidence to show that consumers sought out the lower prices of customers of Vanco's favored competitors. It is Vanco's position that even if this Court were to conclude that an inference of injury to the plaintiff cannot be drawn from a substantial price discrimination, a finder of fact should still be allowed to conclude from other evidence that the plaintiff was injured even if it has not shown specific sales and lost profits. Because the dispute in the case being reviewed revolves around the "automatic damage" concept it is unlikely that either the petitioner or the respondent will fully explore the questions relating to what quantum and types of evidence the plaintiff may rely upon to demonstrate injury, nor does this case present this Court with a set of facts adequate to raise all of the relevant issues.

Even more important, in none of the cases cited by respondent have damages in the amount of the overcharge been denied after injury to the plaintiff was found, since in each of those cases it was held that no injury had been established. Similarly, in the case under review the issues of fact of injury and measure of damage are linked because the Fifth Circuit rejected the finding of injury. If that ruling stands, the ruling on the measure of damages is likely to

stand with it. Yet in Vanco's case, because the fact of injury was otherwise established, the question of whether the overcharge may be a reasonable estimate of the amount of damage presents a completely separate question, and one which will not be presented by the case being reviewed.

Trial and appellate courts will seek much-needed guidance from this Court's opinion in the present case to resolve the whole range of issues related to injury and damage in secondary-line Robinson-Patman Act discrimination cases. Because this Court's opinion will undoubtedly have an impact on the issue raised by Vanco's case but not squarely presented here, it is important to Vanco, to other litigants and to the other federal courts that this Court be presented with the fullest possible view of the issues.

Respectfully submitted,

JOHN T. CUSACK
One First National Plaza
Chicago, Illinois 60603
(312) 726-2452
Attorney for Vanco Beverage, Inc.

November 20, 1980

Of Counsel:
GORDON B. NASH, JR.
EDWARD B. HIRSHFELD
PRISCILLA A. WALTER
GARDNER, CARTON & DOUGLAS
One First National Plaza
Chicago, Illinois 60603
(312) 726-2452

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE

JOHN T. CUSACK
One First National Plaza
Suite 3300
Chicago, Illinois 60603
(312) 726-2452
Counsel for Vanco Beverage, Inc.

Of Counsel:
GORDON B. NASH, JR.
EDWARD B. HIRSHFELD
PRISCILLA A. WALTER
CARDNER, CARTON & DOUGLAS
One First National Plaza
Suite 4600
Chicago, Illinois 60603
(312) 726-2452

La Salle Street Press — Chicago Printed in U.S.A.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE

STATEMENT OF INTEREST AND QUESTION PRESENTED

Vanco Beverage, Inc. ("Vanco") hereby incorporates by reference herein the Statement of Interest and Questions of Law That Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case set forth in paragraphs II and III, respectively, of its Motion for Leave to File Brief as Amicus Curiae which immediately precedes and is bound together with this Brief.

SUMMARY OF THE ARGUMENT

The case before this Court does not involve issues related to what is necessary to establish a violation of Section 2(a) of the Robinson-Patman Act, since the Fifth Circuit did not reject the jury's finding of a violation. *Chrysler Credit Corporation* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1135 (5th Cir. 1979). The only questions presented are what proof a plaintiff must introduce to establish that it was injured by the violation and how the amount of damages resulting from that injury may be measured.

The language of many of the cases relied on by respondent at page 8 of its Brief in Opposition to the Petition for Writ of Certiorari (hereafter "Brief in Opposition") suggests that there is a dispute about how to prove both the fact of injury and the amount of damages in secondary line price discrimination cases. However, the primary dispute actually involves how an injury caused by illegal price discrimination may be proven. No case has been cited in which a court concluded that the fact of injury had been established but that the amount of the overcharge was an improper measure of damages.

The dispute over proof of injury arises out of what inferences are permissible once a violation of Section 2(a) has been proven. Vanco will argue that in appropriate circumstances the fact of injury may be inferred from the overcharge or from other circumstantial evidence, and that proof of specific lost sales and lost profits is not required. The dispute over measurement of damages, on the other hand, centers on when the amount of the price discrimination is an appropriate measure of damages. Vanco will argue that once the fact of damage has been established it is permissible to award the amount of the overcharge as minimal damages.

Unfortunately, the distinction between what is necessary to establish that the plaintiff has been injured in his busi-

ness or property by the defendant's Robinson-Patman Act violation and what is necessary to establish the appropriate amount of the damage award has been lost in many of the cases relied upon by respondent.

It is important that the broad language in these cases and in the Fifth Circuit's opinion on review here should not be construed to prevent a trial court from finding damages in the amount of the overcharge when the fact of injury has been established and the overcharge is a reasonable estimate of that damage.

Section I of this Brief reviews the historical development of the dispute over proof of injury and measurement of damages; Section II analyzes why the overcharge is a proper measure of damages once injury has been demonstrated; and Section III explains why it is proper to infer injury from price discrimination between competitors or from other circumstantial evidence.

ARGUMENT

I. Historical Review of Approaches to Proof of Fact of Injury and Reasonable Estimation of Damages in Secondary Line Robinson-Patman Act Cases.

The split of authority on standards for proof of injury and reasonable estimation of damages in secondary line Robinson-Patman Act cases began with the Second Circuit's decision in *Enterprise Industries, Inc.* v. *Texas Company*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (hereafter *"Enterprise"*). The genesis of the split can be traced to differences between the Second Circuit and the mainstream of authority on how the probable anticompetitive effect element of a Section 2(a) violation may be proven, which resulted in parallel differences in how injury can be proven and how damages may be measured. Analysis of how the split occurred must begin with a look at the two different approaches to proof of probable anticompetitive effect.

The majority approach originated in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948) (hereafter "*Morton Salt*"), and has been refined in subsequent Circuit Court cases. In *Morton Salt*, this Court said that probable anticompetitive effect is "self evident" when there is a substantial price differential between competitors (*Id.* at 50-51). A "substantial" price differential was defined as one large and persistent enough to influence resale prices (*Id.* at 47). Circuit Court cases following *Morton Salt* have refined when a price differential obviously had a potential for reducing competition. For example, *Bargain Car Wash, Inc.* v. *Standard Oil Company (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), summarized the types of price differentials from which the inference of anticompetitive effect would be allowed: (a) a price differential that influences resale prices, (b) a substantial price differential that exists in the context of keen competition and tight profit margins, or (c) a substantial and sustained price differential between competing resellers.[1]

Appellate Courts have also articulated the corollary of the *Morton Salt* doctrine—that where the price differential is not obviously injurious the plaintiff must prove a causal connection between the price differential and a probable anticompetitive effect. For example, in *American Oil Company* v. *Federal Trade Commission*, 325 F.2d 101, 106 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), a price differ-

[1] For leading decisions in other Circuits, see *Foremost Dairies, Inc.*, v. *Federal Trade Commission*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F.2d 674 (2d Cir), *cert. denied*, 361 U.S. 826 (1959), and *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, *reh. denied*, 356 U.S. 905 (1958). See generally 16 C Von Kalinowski, Business Organizations, Antitrust and Trade Regulation § 31.01[2] (hereafter "Von Kalinowski").

ential which occurred sporadically for brief periods did "not present that inherent capability of lessening competitive ability as was evidenced by the discriminatory system in *F.T.C.* v. *Morton Salt Co.*" See also *International Film Center, Inc.* v. *Graflex, Inc.*, 427 F.2d 334 (3d Cir. 1970), where no inference of anticompetitive effect was allowed because the price discrimination had occurred in only three transactions. When the *Morton Salt* doctrine has been applied and a probable anticompetitive effect has been inferred from an egregious price discrimination, it has been difficult for a defendant to rebut the inference that such a price discrimination is likely to have an anticompetive effect.[2]

The Second Circuit has expanded the *Morton Salt* doctrine, to allow a probable anticompetitive effect to be inferred from virtually *any* price differential. The causal connection between the price differential and probable anticompetitive effect is presumed, and it is the defendant's burden to prove that the price differential is not likely to have an anticompetitive effect. This approach was first applied in *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734, *reh. denied*, 326 U.S. 809 (1945) (hereafter "*Moss*"), and followed in *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F.2d 510, 515 (2d Cir. 1951), and *Enterprise, supra*, at 460. A good summary of the Second Circuit approach appears in *Sano Petroleum Corporation* v.

[2] See *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F.2d 517, 522 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968), where the court said injury may be inferred even if the favored customer does not undersell rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services. See also *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, *reh. denied*, 356 U.S. 905 (1958). See generally 16C Von Kalinowski, *supra*, § 31.01[2][c].

American Oil Company, 187 F.Supp. 345, 353 (E.D.N.Y. 1960).[3]

Although it differs from this Court and virtually all other circuit courts by allowing the likelihood of an anticompetitive effect to be inferred from price differentials that are not obviously injurious, the Second Circuit has nevertheless imposed the same heavy burden on the defendant to rebut the inference as other courts have imposed in the context of flagrant price differentials. The *Enterprise* case, *supra,* is an example of such a heavy burden imposed in a situation where the injurious effect was neither obvious nor otherwise established.[4]

Thus, this Court and virtually all circuits other than the Second Circuit allow a probable anticompetitive effect to be inferred only from price differentials which are substantial and obviously injurious. When the price differential is not obviously injurious, the plaintiff must specifically demonstrate the likelihood of an anticompetitive effect. In the Second Circuit, however, the combination of doctrines inferring an anticompetitive effect from virtually any price discrimination and holding the defendant to a high standard

---

[3] The Second Circuit interpreted *Morton Salt* as affirming its approach of inferring probable anticompetitive effect from any price differential because *Moss* was cited in *Morton Salt, supra* at 45, n. 13. *Federal Trade Commission* v. *Standard Brands, Inc., supra,* at 515. However, *Morton Salt* cited *Moss* for the proposition that the term "price discrimination" was a price differential between competing resellers. *Morton Salt* clearly limits the inference of probable anticompetitive effect to certain types of price discriminations, and does not approve drawing such an inference from all discriminations.

[4] See *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F.2d 674 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959), for an example of the Second Circuit imposing a heavy burden of rebuttal in the context of a flagrant price discrimination.

to rebut such an inference means, as a practical matter, that a violation is made out whenever the plaintiff proves the jurisdictional elements of Section 2(a) and any price discrimination.

These differences between the Second Circuit and the mainstream of authority on how anticompetitive effect must be demonstrated have led to differences in what a private plaintiff must show to establish that it has been injured by the price discrimination. This Court has allowed the fact of injury to be inferred from the same facts used to prove or infer probable anticompetitive effect, *provided*: (a) the plaintiff proves that he is within the class of persons or is the person subject to the probable anticompetitive effect, and (b) extraordinary circumstances do not draw the inference into question.[5] If the probable anticompetitive effect has been inferred from substantial price discrimination or has been specifically proven when the discrimination is not obviously injurious, it is also appropriate to infer that persons subject to the anticompetitive effect have been injured. If the defendant demonstrates that extraordinary circumstances make it unlikely that the plain-

---

[5] The probable anticompetitive effect element of Section 2(a) has also been called an "incipiency" element. Theoretically, there is a probable injurious effect if a discrimination might hurt competition in the future, but has not yet had that effect. As a practical matter, such incipiency is an extraordinary circumstance which could draw the inference into question. That can occur when discriminatory prices have just been put into effect, or when a favored purchaser and a disfavored purchaser who have not competed in the past are drawn into competition, perhaps through expansion of their market areas. When a sustained and substantial price differential between competitors has been in effect for a long period, it is highly unlikely that injurious effects are incipient and not actual.

Other extraordinary circumstances that could call the inference of injury into question are discussed *infra* at page 18.

tiff has been injured, then the burden shifts back to the plaintiff to prove that it has been injured.[6]

This Court's approach to how a reasonable estimate of damages may be established is similar to its approach on inferring injury. Once the fact of injury has been established, either by inference or from a further proof, it is presumed that damages amount to at least the overcharge absent extraordinary circumstances. That presumption is made because under commonly understood principles of economics, the overcharge is a direct business injury.[7] If the defendant has shown extraordinary circumstances which draw that presumption into question, then the plaintiff should specifically prove that the overcharge is a reasonable estimate of damages.

Most cases, however, have not distinguished between proof of fact of injury and a reasonable estimate of damages, because in those cases where injury was properly presumed from the price discrimination, it was also presumed that the damages were at least the amount of the overcharge. On the other hand, those decisions that have raised a question as to whether the overcharge was a reasonable estimate of damages have involved situations where the plaintiff was not injured at all by the price discrimination, so that it was unnecessary to reach the question of how damages should be measured.

---

[6] The probable anticompetitive effect element of Section 2(a) is perceived as a "public injury" element. Theoretically, the plaintiff could prove that element by showing that a discrimination has an injurious effect on persons other than itself. That is why the plaintiff must show that it is within the class of persons or is the person subject to injury. See *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969).

[7] The public policy and economic bases of this presumption are discussed *infra* at pages 14-20.

An early opinion which recognized the overcharge as a direct damage is *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).[8] That case referred to the overcharge as an "unequal expense burden" which was "clearly a direct business damage". Then, in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 747 (1946) (hereafter *"Bruce's Juices"*), this Court said that a plaintiff could recover the overcharge as damages without proving more than illegal price discrimination unless there were extraordinary circumstances. *Bruce's Juices* allows the fact of injury to be inferred from the same facts used to prove a probable anticompetitive effect, and allows the overcharge to be presumed as damages once the fact of injury is established. The implication is that if there are extraordinary circumstances, the fact of injury will not be inferred and damages will not be presumed.

Most circuits have followed the approach clearly articulated in *Bruce's Juices*. *Grace* v. *E. J. Kozin Company*, 538 F.2d 170, 174 (7th Cir. 1976); *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) (hereafter *"Russellville"*). The *Russellville* case shows how the *Bruce's Juices* rule works when there are extraordinary circumstances which prevent an inference of fact of injury and presumed damages.[9]

---

[8] This case involved a violation of Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d) and (e), but this is immaterial because the requirement of showing injury and damages is the same for all sections of the Robinson-Patman Act. See note 12 *infra*.

[9] *Russellville* involved one of the first private damage actions based on a basing point price system similar to those that had been found to violate § 2(a) in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726

The Second Circuit, however, has promulgated a different approach. The Second Circuit has said that the fact of injury should not be inferred, but that injury and damages should be demonstrated as ascertained lost sales and lost profits. The Second Circuit's approach appears to be motivated by its standards of proof for probable anti-competitive effect. Since as a practical matter these standards mean that a violation is established when virtually any price discrimination is shown, a further inference of injury and presumed damages could rest on a very flimsy base in the Second Circuit.

Exactly that was the situation in *Enterprise, supra,* where the Second Circuit's approach originated. Although it is difficult to ascertain the facts underlying the *Enterprise* case from the Second Circuit opinion, a careful examination of that opinion and the district court opinion (136 F.Supp. 420 (D. Conn. 1955)) reveals that the plaintiff had complained of price advantages given to businesses with whom it did not compete for the bulk of its business, and that for the major part of its business not in competition with those "favored" businesses the peculiar nature of the price discrimination had left the plaintiff free to charge higher prices and reap higher profits than it otherwise would have. In another circuit, probable injury to competition would have been scrutinized and no violation found, because such probable injury was *de minimus.* The *Enterprise* court found a violation and the way was open to infer injury and presume damages. Rather than holding that the price discrimination did not have a probable anticompetitive effect or articulating the factors that showed that the plaintiff had not been injured, the *Enterprise* court stated that the plaintiff had

---

(1945) and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746 (1945). The *Russellville* court found a violation, acknowledged the *Bruce's Juices* rule, but found exceptional circumstances which rebutted inference of injury and presumption of damages.

failed to prove fact of injury and amount of damages because it had not demonstrated lost sales and lost profits. Thus, the *Enterprise* case is properly understood as an attempt to compensate for the Second Circuit's overly liberal rules for establishing a Section 2(a) violation.[10]

Although the result reached in the *Enterprise* case is correct, the language of the opinion has resulted in a mischievous doctrine which may impose an unrealistic and unfair burden on plaintiffs where an anticompetitive effect has been inferred from an egregious price discrimination or has otherwise been established. In such a case, if the plaintiff is among the class of persons affected by the price discrimination, it is logical to infer that the plaintiff has been injured. When a substantial violation has thus been established, it is appropriate to place the burden of rebutting the inference of injury on the defendant.

The consequences of the Second Circuit's doctrine may have come to fruition in the case under review. In the present case the Fifth Circuit appears to have been even more stringent than *Enterprise* in its approach to proof of injury and measure of damages. The Fifth Circuit follows the Supreme Court's approach toward proof of probable anticompetitive effect. *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965). However, in addition to the safeguards imposed by the *Morton Salt* approach to proof of a violation, the Fifth Circuit has now imposed the stringent *Enterprise* approach to proof of injury and measurement of damages. It imposed a heavy burden of proof of fact of injury, as is evident from its reversal of

[10] This is evident from the *Enterprise* court's comment that because the defendant already had a heavy burden to attempt to rebut the inference of a violation once a price discrimination is shown, it would be unfair to require the defendant to rebut the inference of injury and damages as well. *Enterprise, supra,* at 460.

both the jury verdict and the denial of the defendant's motion for a judgment notwithstanding the verdict. The Fifth Circuit also stated that the overcharge should not be recognized as a general damage.

The following sections explain why it is permissible to allow the overcharge as a reasonable estimate of damage, and why fact of injury should be inferred in appropriate situations.

II. A Damage Award in the Amount of the Overcharge is Permissible When the Fact of Injury Has Been Established.

Once a plaintiff has established that it was injured in its business or property by the defendant's price discrimination in violation of the Robinson-Patman Act, it is permissible for a court to find damage in the amount of the overcharge because a reasonable estimate of the amount of damage is all that is required of an antitrust plaintiff and the amount of the overcharge is a reasonable estimate of the minimum amount of damage. The arguments contrary to this proposition are incorrect or irrelevant.

Reasonable Estimate

It is well established that

> " 'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's right." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66 (1946) (quoting *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)).

See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In fact, the Fifth Circuit recognized in the case under review that all that was required was a showing of the "approximate amount" of damage. *Chrysler Credit Corporation* v. *J. Truett Payne Inc., supra,* at 1135.

Overcharge as a Reasonable Estimate

This Court recognized in *Bruce's Juices supra,* at 757, that in a Robinson-Patman Act price discrimination case an award in the amount of the overcharge is proper.[11]

Numerous other courts have also approved damages in the amount of the overcharge. *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., supra; Fowler Manufacturing Co.* v. *Gorlick, supra; Grace* v. *E.J. Kozin Company, supra; State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.,* 202 F.Supp. 768 (N.D. Ill. 1961).[12]

---

[11] This statement cannot be dismissed as mere dictum, even though the narrow holding of *Bruce's Juices* was that a Robinson-Patman Act claim could not be asserted as an offset in defense to a contract action for money due. The quoted passage was important to the holding because the petitioner had asserted that the difficulty of proving damages in a separate Robinson-Patman Act case would leave it without redress. The Court's ruling that damages would be presumed upon a showing of a discriminatory price differential was an important element in its rejection of the petitioner's argument.

[12] The *Elizabeth Arden* case was brought under Sections 2(d) and 2(e) of the Robinson-Patman Act, *Grace* under Section 2(c) and *State Wholesale Grocers* under Section 2(d). In its Brief in Opposition respondent attempts to distinguish cases brought under Sections 2(d) and 2(e) (and also, presumably, 2(c)) on the ground that such cases do not require a demonstration of likelihood of competitive injury. This is irrelevant, since that requirement is an element of the offense, which the Fifth Circuit assumed to have been established. The issues presented, which involve how fact of injury and amount of damage may be established under Section 4 of the Clayton Act, are equally applicable to violations of other sections of the Robinson-Patman Act as they are to Section 2(a) violations. Moreover, the proof that is necessary to establish damages is at least as stringent as that required to show the liklihood of an anticompetitive effect.

The willingness of this Court and others to allow damages to be assessed in the amount of the overcharge is grounded in a recognition both of the practicalities of what a private antitrust plaintiff can reasonably be required to prove and of economic reality in the unique context of a Robinson-Patman Act violation.

The respondent implies that a Robinson-Patman Act plaintiff should be required to demonstrate specific lost sales and a specific amount of lost profits. Brief in Opposition at 16. Such a rule, which would require a plaintiff to prove what would have happened but for the defendant's violation, would reverse the appropriate burden of proof and would be virtually impossible for most plaintiffs to satisfy and most courts to apply. As this Court has recognized in a similar context,

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more bouyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised the prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable." *Hanover Shoe, Inc.* v.

United Shoe Machinery Corp., 392 U.S. 481, 492-493 (1968) (hereafter "*Hanover Shoe*").[13]

A brief synposis of the problems of proof presented by Vanco's case provides a vivid example of the concerns articulated by this Court in *Hanover Shoe*. Although the district court found that Vanco had lost both profits and sales because of the defendant's price discrimination, the calculation of how much of each were lost was difficult because Vanco had at times absorbed all or part of the discrimination in order to maintain competitive resale prices and at other times had maintained a profit margin that would allow it to be at least marginally profitable, which resulted in higher resale prices and consequent loss of volume. Further complications arose because the popularity of the defendant's brand of beer was generally declining[14] and Vanco had sought to compensate for the loss of its volume of the defendant's beer by purchasing the right to distribute other brands of beer as well. In addition, although Vanco established that its going concern value declined

---

[13] See also *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 741-746 (1977). Plaintiffs would no doubt continue to try to establish specific damage, which would result in the kind of 2000-page record on the single issue of injury which was deplored by this Court in *Morton Salt, supra,* at 50.

[14] Vanco showed, in addition to other evidence, that some of its loss of volume was attributable to the price discrimination rather than to the declining popularity of defendant's beer by comparing the relative rate of decline in its sales to those of its competitors favored by the price discrimination and to those of noncompeting distributors of the defendant's beer who were not affected by the price discrimination.

The substantial nature of the price discrimination in Vanco's case is shown by the District Court's holding that over the six year period in question the discrimination against Vanco ranged from 9.69% to 29.2%. *Vanco Beverage, Inc.* v. *Falls City Industries, Inc., supra,* at page 75,814.

substantially during the years in question, an indeterminable part of this decline may have been due to a recapitalization and to changes in corporate policy. To require a plaintiff like Vanco to prove specific lost sales and lost profits would both unfairly disadvantage it and would also severely undercut the private damage remedy in Robinson-Patman Act cases and the public policy it serves.[15]

Equally important, as a matter of economic reality the amount of the overcharge is a reasonable estimate of the plaintiff's minimum damages in the unique context of a Robinson-Patman Act case. Once a plaintiff has demonstrated that it was illegally discriminated against *vis-a-vis* its competitors and also that it was injured by such price discrimination, it is reasonable to measure that injury by the amount of the price discrimination because of the very nature of the competitive relationship. In a simple model case with only two possible responses, where a defendant raises its price to the plaintiff but not the plaintiff's competitors, or reduces its price to the plaintiff's competitors but not to the plaintiff, the plaintiff must either raise its resale price to maintain the same profit margin as its competitors or maintain the same resale price as its competitors but retain a smaller profit margin. If the plaintiff chooses the latter course and its competitors are generally maintaining profit margins that provide a "normal" return on equity, the plaintiff will have been injured in the amount of its decreased profit caused by its absorption of the price discrimination, *i.e.*, in the amount of the price discrimina-

---

[15] Although the Robinson-Patman Act has been the target of much criticism by members of the antitrust bar, properly applied it reinforces the other antitrust laws and promotes competition and economic efficiency. See note 29, *infra*. In any event, so long as the statute is on the books it is the obligation of the judicial branch to see that it is effectively and even-handedly enforced.

tion.[16] If the plaintiff chooses to pass the price discrimination on to its customers via higher prices than are charged by its competitors, a fundamental law of economics is that the plaintiff will lose sales to those competitors.[17] The calculation of damages will then be complicated by a necessarily speculative projection of lost volume based on elasticity of demand and consumer price sensitivity and on the plaintiff's marginal profit rate.[18] It is entirely possible that these damages could exceed the amount of the overcharge, or that the loss in the going concern value of the business could exceed the amount of the overcharge. If the plaintiff can prove such damages, it should be allowed to collect them.

---

[16] It has been argued that if the plaintiff's competitors maintain the same resale prices as the plaintiff by increasing their profit margins so that the plaintiff still earns a "normal" profit, the plaintiff has not been "injured" by the price discrimination even though his competitors may have reaped a windfall. M. Handler, Twenty-Five Years of Antitrust, v. 2 (1973) p. 898 (hereafter "Twenty-Five Years"). As will be discussed *infra* (pp. 24-25), in the competitive context an unfair advantage of this sort to the plaintiff's competitor is an injury to the plaintiff even if it is able to maintain a "normal" profit on the item involved in the price discrimination.

[17] In the real world a disadvantaged competitor is unlikely to take either of these extreme positions, but instead will pass through a part of the price discrimination and absorb the rest, with the amount passed through and the amount absorbed varying over time. Moreover, the plaintiff's competitors presumably will react to the plaintiff's actions by altering their pricing, advertising and other business decisions, in a continuous interaction with the plaintiff's policies that probably defies the ability of currently available tools of economic analysis to unravel and reconstruct.

[18] Even if the application of sophisticated techniques of economic analysis to the type of data reasonably available made it theoretically possible to arrive at a reliable calcu-

It is also theoretically possible for the plaintiff to pass through the entire amount of the overcharge and nevertheless to sustain no damages from lost volume, or to sustain damages which are substantially less than the overcharge. This could occur, for example, if: (1) the greater part of the plaintiff's sales were not in competition with the favored competitors, (2) there were countervailing advantages to the plaintiff from the price discrimination which offset the damages in whole or in part, or (3) the demand for the product sold by the plaintiff and its competitors was extremely inelastic and its purchasers insentitive to price (the paradigm case being a cost-plus contract). Vanco submits that these are the sort of extraordinary circumstances, recognized by this Court in *Bruce's Juices* and *Hanover Shoe,* both *supra,* in which the amount of the discrimination is not a proper measure of damage. However, the burden should be on the defendant to establish such extraordinary circumstances, both because they *are* extraordinary and because otherwise the plaintiff would bear the nearly insuperable burden of proving a negative. Further, the complex evidence the plaintiff would be compelled to introduce in an attempt to demonstrate the precise effect of the overcharge (which the defendant would no doubt seek to rebut with

---

lation of lost profits and lost sales and the effect of these on the plaintiff's business, the process of doing so would put an intolerable burden on trial courts. As this Court has recently recognized,

> "In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these [elasticity] concepts, it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. . . . [A]ttention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variable would have behaved had there been no overcharge." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 742-743 (1977) (citation omitted).

equally complex calculations) would be an unnecessary imposition on already overburdened trial courts. Vanco also submits that a careful analysis of the facts as reported in the district and appellate decisions in *Enterprise* and *Russellville,* both *supra,* reveals that the first and second of these extraordinary factors were present in the *Enterprise* case, and that the second and third were present in *Russellville.* If a defendant can establish that a plaintiff was not injured in at least the amount of the overcharge, of course that amount should not be awarded.

In the usual case, however, neither party will be able to establish the exact amount of damage for the reasons articulated by this Court in the *Hanover Shoe* case, *supra.* In such a case, the plaintiff's inability to prove specific lost sales and lost profits should clearly not defeat its right to recompense for the injury it has demonstrated from the defendant's violation of law. The amount of the overcharge is a reasonable approximation of the damages suffered because it is no more than the amount the plaintiff would have been damaged if it had absorbed the whole price discrimination[19] and it is the amount by which

[19] The amount of the overcharge will not, in absence of exceptional circumstances, exceed the amount by which the plaintiff would have been damaged if it had absorbed the entire discrimination and maintained resale prices competitive with those of its favored competitors. In that case, the plaintiff would have sold X units and its damage would properly be measured as the amount of the discrimination ("D"), times its volume, or DX. If, however, the plaintiff passed through some of the discrimination in the form of higher prices, it must be assumed (in the absence of exceptional circumstances) that the plaintiff lost some sales, so that its volume was not X, but X-Y. Damages based on the overcharge are calculated on the plaintiff's actual, reduced volume and are therefore less than what the plaintiff would have been awarded if it had absorbed the entire discrimination. These damages can be expressed as D(X-Y).

the plaintiff would demonstrably have been better off and his business stronger but for the price discrimination.[20]

The economic truism that a plaintiff has been damaged at least in the amount it is out-of-pocket because of an antitrust violation was recognized by this Court in the *Hanover Shoe* case, *supra* at 490 "A person whose property is diminished by a payment of money wrongfully induced is injured in his property." The same principle has been widely applied in Robinson-Patman Act cases, as the cases cited at page 13 *supra* demonstrate. As Chief Judge Campbell put succinctly in *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co., supra*, at 774:

> "[T]he non-favored customer has in fact been damaged, in the absence of proof of other damages, to the extent of the [discrimination]. As a result of the violation, the non-favored customer is left with less in its treasury—less in profits, less to carry on its business, or less to keep in reserve. The non-favored customer has less money than he would otherwise have and, therefore, has been damaged."

Principles Cited to the Contrary Are Unpersuasive.

The decisions that have purported to deny damages measured by the amount of the overcharge[21] have mentioned two theories relating to the measure of damages, neither of which is persuasive. Moreover, the leading cases cited for the principle that such damages are inappropriate

---

[20] This is not, of course, to suggest that the plaintiff must prove that it absorbed the whole amount of the discrimination. The point is that to allow the amount of the overcharge as damages will result in a smaller recovery for the plaintiff if he did pass through some of the overcharge, resulting in some loss of volume, than if he had absorbed the whole amount.

[21] All of these decisions, as indicated *supra*, arose in the context of denying any damages because no *fact* of injury had been established.

reveal the exceptional circumstances under which, Vanco would agree, such damages are inappropriate.

First, some decisions have borrowed a principle from Interstate Commerce Commission ("ICC") rate discrimination cases, to the effect that if a plaintiff establishes an illegal overcharge, it is entitled to be reimbursed in the amount of the overcharge, but if it establishes merely that a legal rate results in a discrimination against it, the plaintiff may recover only the amount by which it was damaged. *Interstate Commerce Commission* v. *United States ex rel Campbell,* 289 U.S. 385 (1933). Some courts have sought to analogize Sherman Act violations, in which this Court has unequivocally held that the plaintiff is entitled to damages in the amount of the overcharge,[22] to the ICC illegal overcharge cases. A Robinson-Patman Act violation is, according to this theory, more like a legal but discriminatory ICC rate case, so that the plaintiff must show specifically how it was damaged.

The attempted analogy is unpersuasive for at least three reasons. First, the semantic quibble over whether a Robinson-Patman Act price discrimination results in an "overcharge" to the plaintiff or merely a discrimination between it and its competitors is irrelevant in the realties of the competitive marketplace, as discussed *infra* at note 28. Second, unlike a freight rate, there is nothing inherently illegal about any price. A price is illegal only if it has been proven to be in violation of the antitrust laws. If it has been so proven, it is equally illegal regardless of whether the reason for the illegality is that the price resulted from price fixing or that the price is discriminatory between competitors. Third, and most fundamentally, rates in ICC cases have been administratively established and bear a strong presumption of validity.[23] A principle derived from this

---

[22] *Hanover Shoe, supra.*

[23] An "illegal overcharge" in this context is a rate in excess of that approved by the ICC. A legal, but discrimina-

unique line of cases should not be superimposed on antitrust cases, especially where this Court has already stated, in *Bruce's Juices, supra,* that inferring damages in the amount of the overcharge is permissible in Robinson-Patman Act cases, just as it is in Sherman Act cases.[24]

A second reason mentioned in some decisions for not assessing damages in the amount of the overcharge involves the use of negative legislative history. A proposed section of the Robinson-Patman Act, which would have directed presumed damages to be assessed in every Robinson-Patman Act case in the amount of the discrimination, was omitted from the final bill. The deletion of this proposal, however, demonstrates nothing. It is completely consistent with a Congressional belief that the proposed language would have been redundant, since the general rules of damages would reach the same result. Also, Congress may have recognized that in the exceptional circumstances discussed above, an inference of damages in the amount of the discrimination should not be mandated. Speculating on why Congress did not enact proposed legislation is usually fruitless. Such an attempt is particularly inappropriate where the restrictive theory of damages which it seeks to justify was rejected by this Court in *Bruce's Juices, supra,* years after the legislative inaction on which the speculation is based.

---

tory rate is one which has been approved by the ICC but which a shipper seeks to show results in a discrimination against it. As was recognized in *Enterprise, supra,* and further explained in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., supra,* in that situation to award the shipper the amount of the discrimination, without more, could result in an unlawful rebate.

[24] It should also be recognized that the leading case of this line, *Interstate Commerce Commission* v. *U.S. ex rel Campbell, supra,* held merely that an Interstate Commerce Commission decision that damages should not be awarded entailed a discretionary judgment and therefore could not be the subject of a writ of mandamus.

Finally, as previously indicated, a careful reading of the facts involved in *Enterprise* and *Russellville,* both *supra,* suggests that both cases involved exceptional circumstances of the sort described at page 18 *supra,*[25] so that there was in fact no injury in spite of the price discrimination.[26]

Thus, neither the principles nor the cases relied upon by the respondent present persuasive reasons to abandon the principle that in an appropriate case where injury has been established, the amount of the overcharge may provide a reasonable estimate of the damage. Allowing an inference of damage in this amount is not unfair to the defendant, since it is usually the minimal amount of damage the plaintiff will have suffered. Moreover the defendant, which has been found to be an antitrust law violator, can rebut the inference in appropriate circumstances.

III. It Is Permissible to Infer the Injury from Other Factors.

After a plaintiff has clearly established that the defendant violated the Robinson-Patman Act, it still must show that it suffered an injury as a result of that violation, in order to be entitled to damages under Section 4 of the Clayton Act. For the same reasons discussed at length above (pp. 14-16), it will often be impossible for a plaintiff who

---

[25] The other cases cited by respondent may well also have involved such exceptional circumstances, although the opinions do not so indicate.

[26] The *Russellville* court clearly articulated this basis for its decision.

> "We do not doubt that, ordinarily, where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages, but we think that this is not so here." *Russellville, supra,* at 55.

It is particularly unfortunate that the *Enterprise* court did not articulate this reason, but instead announced broad dicta which may have misled later courts.

has suffered price discrimination to demonstrate its injury by showing specific lost sales and a specific amount of decreased profits. It is Vanco's belief that in such a situation it is permissible to infer injury from the existence of the price discrimination in the competitive context, especially if the discrimination is substantial and sustained. If this Court disapproves of such inferences, a plaintiff should be allowed to establish injury through circumstantial evidence, without having to show specific lost sales and profits.

An Inference Is Permissible

To prove a Robinson-Patman Act violation, the plaintiff must establish that it has been discriminated against *vis-a-vis* its *competitors* and that this price discrimination may have an adverse effect on competition. In such a context it is entirely appropriate to infer that a plaintiff was injured by the proven unfair advantage of its competitors. This Court recognized the propriety of such an inference in *Bruce's Juices, supra*, as have the other courts cited on p. 9, *supra*.

It has nevertheless been argued that a showing that a plaintiff would have been better off but for the defendant's antitrust violation is insufficient to demonstrate the injury to business or property necessary to recover damages under Section 4 of the Clayton Act.[27] The theory goes as follows: If the plaintiff's competitors receive a discriminatory decrease in price but do not reduce their resale price, the plaintiff has not been harmed, although the competitors may be reaping extra profits.[28] Clearly, however, the plaintiff has been harmed, because he has been denied the oppor-

[27] M. Handler, Twenty-Five Years, *supra* note 16, at 898.

[28] M. Handler, *Id.* Although Mr. Handler insists that the Robinson-Patman Act requires a discriminatory "undercharge" to the plaintiff's competitors rather than an "overcharge" to the plaintiff, the hypothetical in the text above reveals that in the context of discriminatory prices charged

tunity, which his competitors enjoy, of maintaining the same profit margin while reducing prices, thereby increasing volume and total profits. Moreover, the plaintiff's competitors have increased profits resulting from their lower costs which may be used to strengthen the financial or capital base of their businesses or to enhance their competitive position through, for example, increased advertising, services, diversification or integration. Most importantly, the consequence of this "no injury" theory is to allow higher resale prices than would have resulted from competition on an equal basis, since by the theory's own logic the reason there will be "no injury" to the plaintiff is that its competitors are reaping windfall profits.[29] Not only is the plaintiff injured in such a situation, but so are consumers and the integrity of the competitive system which the antitrust laws were designed to protect.[30]

---

competitors the overcharge-undercharge distinction is irrelevant. The effect of the example in the text would be precisely the same if the defendant instituted a discriminatory price increase to the plaintiff, causing it to raise its resale prices, if those higher prices were followed by its competitors.

[29] Another possibility is that the plaintiff and its competitors are making approximately the same profit not withstanding the price discrimination because the plaintiff is more efficient. In this situation the effect of the price discrimination will be to advantage the inefficient competitors, making them more likely to survive competition from more efficient firms and to weather economic downturns. Courts and commentators have recognized in other contexts that an application of the antitrust cases that favors inefficient firms is socially counterproductive and has a deleterious effect on the market. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of Sherman Act, 88 Harv. L. Rev. 697 (1975).

[30] The Robinson-Patman Act fosters efficiency through protecting equality of competitive opportunity. (*Continued.*)

Courts have recognized the logic of the foregoing analysis:

> "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene. *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F.2d 152,155 (7th Cir. 1956), *cert. denied,* 355 U.S. 941, *reh. denied,* 356 U.S. 905 (1958). (See also cases cited therein.)

If this Court is unwilling to allow an inference of injury from the existence of price discrimination between competitors, it should nevertheless allow such an inference where the plaintiff has established that the price discrimination was substantial and sustained, affected the resale price or occurred in the context of keen competition or narrow profit margins. *Morton Salt; Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana); Foremost Dairies, Inc.* v. *Federal Trade Commission; E. Edelmann & Company* v. *Federal Trade Commission,* all *supra.*

Circumstantial Evidence

A plaintiff should, in any event, be allowed to prove injury from other circumstantial evidence. Vanco, for example, showed declines in sales volumes and profitability relative to its favored competitors and relative to similar businesses unaffected by the price discrimination. Vanco introduced advertisements by customers of favored com-

---

> "[I]f the law preserves a society of numerous businesses, the pressures imposed by their competitive interaction will spur firms to lower costs and to become more efficient and will reduce the chances of interdependent high pricing in the industry." American Bar Association Section of Antitrust Law, Monograph 4, vol. 1, The Robinson-Patman Act: Policy and Law (1980), p. 24.

See also *Standard Motor Products, Inc.* v. *Federal Trade Commission, supra,* at 676-677.

petitors soliciting business in the natural market area of Vanco's customers and quoting lower prices. Vanco submitted surveys and direct evidence to show that consumers sought out the lower prices of customers of its competitors. A finder of fact should be allowed to infer from this type of evidence that injury occurred. Defendants who have already been found to have violated the Robinson-Patman Act should not be allowed to escape liability by imposing on plaintiffs a standard of proof of injury that is unreasonably strict.

Contrary Arguments Unpersuasive

The reasons usually advanced by Robinson-Patman Act defendants for not allowing an inference of injury from one or more of the factors discussed above are unpersuasive. First, it is said the plaintiff may not have been injured at all because it may have "passed through" the price discrimination to its customers with no loss of volume. As discussed above,[31] in the competitive context this would truly be an extraordinary circumstance, and one that the defendant should be required to prove.[32] Moreover, this argument is tantamount to raising a "passing on" defense, which the Court repudiated in *Hanover Shoe, supra,* at 489 (emphasis supplied):

> "[W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of Section 4. . . . *We hold that the buyer is equally entitled to damages if he raises the price for his own product.* As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the

[31] See discussion at pages 16-19, *supra.*

[32] As noted at pages 10, 19 and 23, *supra,* it appears that the defendants in *Russellville* and *Enterprise,* both *supra,* may have succeeded in making such a showing.

buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.[33]

The holding of *Hanover Shoe* was recently reaffirmed in *Illinois Brick Co.* v. *Illinois, supra.*[34]

---

[33] In some earlier cases, the argument was advanced that although "passing-on" was not a defense if the plaintiff was a "consumer" (i.e., used the product in a manufacturing process), it was a defense if the plaintiff was a "middleman" (i.e., resold the product without substantial alteration). Any attempt to maintain such a distinction was defeated in *Illinois Brick Co.* v. *Illinois, supra*, at 735 and n. 15.

Although both the *Hanover Shoe* and *Illinois Brick* cases, both *supra*, involved Sherman Act violations, their holdings are not limited to that context. Both decisions refer consistently to damages under Section 4 of the Clayton Act, which provides the remedy for all antitrust violations: neither decision intimates that its holding is confined to Sherman Act violations: and the reasons articulated for the holdings apply as well to Robinson-Patman Act violations as to Sherman Act violations. Moreover the same principle had earlier been applied in *Bruce's Juices, supra*, which was a Robinson-Patman Act case.

[34] Mr. Handler has approved the *Illinois Brick* decision, which favors defendants, without acknowledging that its logic is inconsistent with the thesis he has developed to avoid the inference of injury in Robinson-Patman Act cases. Handler, *Changing Trends in Antitrust Doctrine; An Unprecedented Supreme Court Term—1977*, 1977 Colum. L. Rev. 979 (hereafter *"Changing Trends"*). Indeed, the *Enterprise* decision and its progeny have resulted largely from the efforts of Mr. Handler, a well-known antitrust defense lawyer. He defended the Texaco Company in *Enterprise* and has subsequently repeatedly praised that decision and criticized conflicting ones in his writings and in his annual review of antitrust developments for the Association of the Bar of the City of New York. M. Handler, Twenty-Five Years, *supra*, note 16; Handler, *Changing Trends, supra.* His client, the Texaco Company, was the defendant in no fewer than four of the cases cited by the respondent as following *Enterprise*. His law firm, Kaye, Scholer, Fierman,

A second argument sometimes advanced against allowing an inference of injury is that somehow such an inference does not establish the requisite causal connection. It is customary to buttress this argument with citations to *Perkins* v. *Standard Oil Co. of California* 395 U.S. 642 (1969), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), both of which are irrelevant. The *Perkins* case involved an attempt by the defendant to avoid Robinson-Patman Act liability by introducing a straw middleman so that the discriminatory sales technically occurred at different levels in the distribution chain. The *Brunswick* case involved an attempt by the plaintiffs to use the defendant's antitrust violation as an occasion to gain an advantage even though the only "injury" they suffered was from the defendant's continued competition, not from its illegal behavior.[35] Defendants apparently attempt to read the *Perkins* and *Brunswick* decisions to say that causality cannot be inferred, but must be specifically proved. These cases clearly do not stand for any such proposition.

Hays and Handler, was recently counsel for Texaco in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), a far-reaching opinion that contains many careless errors. Among these are the citation of irrelevant cases (478 F.Supp. at 275, n. 69) and the erroneous statement that *Fowler, supra,* which is contrary to *Enterprise,* was decided ten years before *Enterprise,* when in fact the opposite is true. *Id.* This error is significant in light of the Supreme Court's denial of certiorari in *Fowler.* Thus the cases following *Enterprise* are largely the result of a successful campaign by a special interest group.

[35] This Court rejected the plaintiff's theory in *Brunswick,* explaining that the *type* of injury suffered by the plaintiff must be the type that would be expected from the nature of the violation. Clearly, lost profits and sales and the inability to compete effectively with the favored competitors are precisely the type of injury to be expected from a Robinson-Patman Act violation.

Perkins and *Brunswick* can also be viewed as turning on whether the plaintiffs were within the class of persons injured by the defendant's violation.

CONCLUSION

For the reasons discussed above, Vanco Beverage, Inc. respectfully urges this Court:

(1) to recognize that when a plaintiff has established that it has been injured by price discrimination in violation of the Robinson-Patman Act but is unable to prove damages in a greater amount, a court may award the amount of the overcharge as damages unless the defendant demonstrates that the actual damages were less; and

(2) to reaffirm the standard of proof of injury established in *Bruce's Juices* so that all reasonable inferences from the facts and circumstances will be allowed and plaintiffs will not be required to show specific lost sales or profits to prove they were injured.

Respectfully submitted,

JOHN T. CUSACK
Attorney for Vanco Beverage, Inc.
One First National Plaza
Chicago, Illinois 60603
(312) 726-2452

November 20, 1980

Of Counsel:
GARDNER, CARTON & DOUGLAS
GORDON B. NASH
EDWARD B. HIRSHFELD
PRISCILLA A. WALTER
One First National Plaza
Chicago, Illinois 60603
(312) 726-2452

CERTIFICATE OF SERVICE

John T. Cusack certifies that he is a member of the Bar of this Court and that he caused the attached MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC. AND BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE to be served upon Morris K. Sirote, at Sirote, Permutt, Friend, Friedman, Held & Apolinski, P.A., 222 Arlington Avenue South, Birmingham, Alabama 35205, and upon J. Frederic Ingram at Thomas, Taliaferro, Forman, Burr & Murray, 1600 Bank for Savings Building, Birmingham, Alabama, 35203, and Howard Adler, Jr., counsel for Falls City Industries, Inc., at Bergson, Borkland, Margolis & Adler, 11 Dupont Circle, N.W., Washington, D.C. 20036, by sending them the requisite number of copies through Federal Express Corporation's one day express service on November 20, 1980.

_____

John T. Cusack